Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

ANDREW G. MALONEY,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT OF THE STATE
NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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April 2002

QUESTIONS PRESENTED

WHETHER THE APPELLANT HAS BEEN DENIED HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAW RESULTING FROM THE IMPOSITION OF A MORE SEVERE SANCTION FOR A DISCIPLINARY INFRACTION THAN THAT GENERALLY IMPOSED BY THE JUDICIAL DEPARTMENT IMPOSING THE SANCTION, AS WELL AS THE VARIOUS DEPARTMENTS THROUGHOUT THE STATE FOR SIMILAR INFRACTIONS?

WHETHER THE APPELLANT HAS BEEN DENIED DUE PROCESS OF THE LAW EMANATING FROM HIS COUNSEL'S MATERIAL OMISSIONS OF SEVERAL EVIDENTIARY DOCUMENTS, AS WELL AS THE COMMISSION OF SEVERAL ERRORS AND OMISSIONS IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL?

WHETHER THE NEW YORK STATE COURT OF APPEALS ERRED IN HOLDING THAT THE ORDER ISSUED BY THE APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, DATED AUGUST 7, 2001, IS NOT A FINAL ORDER WITHIN THE MEANING OF THE CONSTITUTION OF THE STATE OF NEW YORK?

PARTIES TO THE PROCEEDING

The Petitioner in this case is ANDREW G. MALONEY, a former member of the Bar of the State of New York.

The Respondent is the Grievance Committee for the State of New York for the Ninth Judicial District.

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Andrew G. Maloney, Petitioner, respectfully petitions for a writ of

certiorari to review the Order of the New York State Court of Appeals, denying Petitioner appellate review.

OPINIONS BELOW

The Order of the New York State Court of Appeals dated March 26, 2002 denying Motion for Leave to Reargue is unreported. The January 15, 2002, Decision and Order of the New York State Court of Appeals granting Leave to Reargue, but dismissing the Petition on procedural grounds has been designated for publication, but is not yet reported. The Decision and Order of the Court of Appeals dated October 23, 2001 denying Leave to Appeal has been designated for publication, but is not yet reported. The decision of the Appellate Division, Second Judicial Department for the State of New York dated August 7, 2001 is unreported. The decision of the Appellate Division, Second Judicial Department for the State of New York dated April 16, 2001, is reported at 723 N.Y.S.2d 674 (A..D. 2nd Dept. 2001).

JURISDICTION

On January 15, 2002 the New York State Court of Appeals granted the Petitioner's Motion for Leave to Reargue, but dismissed the Petition on the grounds that the decision appealed was not a final decision within the meaning of the Constitution. On March 26, 2002, the New York State Court of Appeals, denied Petitioner's Motion for Leave to Reargue. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New York Constitution, Art.VI, Sec. 3

New York Civil Practice Law & Rules, Sec. 2221(e)

New York Civil Practice Law & Rules, Sec. 5501

New York Civil Practice Law & Rules, Sec. 5701(2)

U.S. Const., Fifth Amendment

U.S. Const., Sixth Amendment

U.S. Const., Fourteenth Amendment

28 U.S.C. Sec. 1257(a)

STATEMENT OF THE CASE

Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, states have the right to regulate businesses, including the professional licensing and conduct of attorneys. However, in the case at bar, there has been an inconsistent application of the sanctions imposed by the New York State Judicial Department issuing the sanction, as well a substantive variation among the various jurisdictions on a state-wide, as well as nationwide basis for the same infractions. The best interests of justice dictate that a uniform system of sanctions be formulated, thereby eliminating the unequal application of the law throughout the state, as well as the nation.

1. Background. The charges brought against Petitioner emanate from a sua sponte investigation commenced in 1996 by the Disciplinary Committee for the First Judicial Department ("DDC") of the State of New York resulting from a returned check drawn on Petitioner's IOLA account in May 1996. Petitioner fully cooperated with Petitioner's investigation and voluntarily attended two depositions on July 15, 1997 and June 16, 1998 at the offices of the Petitioner, providing numerous files and bank records in connection with the Petitioner's investigation. Petitioner

expanded the scope of its investigation that resulted in a complete audit of Petitioner's escrow and business accounts, and in essence, his practice, from 1994 to 1999.

On or about November 21,1999, Petitioner was served with a motion for interim suspension, along with a Petition alleging seventy five charges of misconduct. Many of the charges were the result of technical errors in the Petitioner's maintenance of his escrow account based upon his misunderstanding as to the true nature and operation of a trust account and several mathematical errors. Most of the charges were non-related to the subject of the initial inquiry. It is also important to note that many of the charges were duplicitous in nature and were the result of several different charges being brought relating to each incident of alleged misconduct. Petitioner's motion for interim suspension was denied by the Appellate Division of the State of New York, Second Judicial Department ("Appellate Division"), by Order dated December 27, 1999 (unpublished) (A-1) finding that the Petitioner had failed to establish that Petitioner was an immediate threat to the public and appointed a Special Referee to "hear and report" his findings on the issues raised in the Petition to the Appellate Division.

Immediately prior to and during the hearing, several of the charges against Petitioner were withdrawn. Several of the charges were also amended one day prior to the scheduled hearing despite Petitioner's objection to same during the course of the hearing. It should be noted that despite the numerous charges brought, there was neither a complaint filed against the Petitioner by anyone of his clients, nor was anyone harmed by any of the Petitioner's actions. Moreover, there was no finding of venality by the Referee hearing the matter, who classified many of the actions leading to the charges as "mistakes".

Subsequent to the evidentiary hearing held on March 8 & 9, 2000, by Report dated July 19, 2000, the Special Referee adopted that Report submitted by the Petitioner, and sustained all charges then pending against Petitioner despite Petitioner's submission of credible documentary evidence

at trial and to his counsel subsequent to trial, that would have exculpated him from several of the pending charges. Apparently, the documents, which included supplementary bank records which were provided to Petitioner's former Counsel, were never submitted to the court by Petitioner's former counsel, to Petitioner's detriment. Moreover, there is no record on file that confirms whether Petitioner's Proposed Report, as requested by the court, was ever submitted to the Referee by Petitioner's former counsel. Consequently, based upon information and belief, the Proposed Report submitted by the Petitioner was accepted and adopted by the Referee hearing the matter, thereby setting the tone for strong imposition of sanctions that was to be imposed by the Appellate Division.

A decision was issued on or about April 16, 2001 (A-3) by the Appellate Division disbarring Petitioner from the practice of law, five years subsequent to the commencement of the initial investigation, despite the court acknowledging in its decision, several mitigating factors, including, but limited to, Petitioner's cooperation with the Petitioner, lack of any harm to any client, lack of any complaint by any client, Petitioner's expression of remorse, contrition, lack of likelihood of said matter reoccurring, and Petitioner's service to the bar and community which was noted as being numerous. Petitioner subsequently filed a Motion for Reconsideration of the Severe Sanction Imposed on or about May 16, 2001 with the Appellate Division (A-12).

During the course of submission of the underlying papers to the Appellate Division, Petitioner was represented by counsel, namely, Law Offices of Jerome Karp, P.C.. Upon the submission of the Motion for Reconsideration, Petitioner appeared, pro se, and raised several issues which were not previously raised in the original submission of documentation to the court by Petitioner's prior counsel, including, inter alia, several violations of Petitioner's constitutional rights within the context of the hearing, as well as the failure of the Petitioner's prior counsel to submit several critical pieces of documentary evidence during and after the evidentiary hearing to the court that would have exonerated Petitioner from several of the charges that were pending, and may have had the effect

of the court tempering the imposition of the harsh sanction of disbarment for the infractions committed. Petitioner also raised the issue of the inconsistent application of the imposition of sanctions for similar infractions by the Appellate Division, Second Department, the judicial district who ruled on the matter, and several judicial departments throughout the State of New York. Said issues were not the subject of prior review by the court in this instant proceeding.

During the course of his review of his file at the Appellate Division prior to the submission of Reply papers in connection with his Motion for Reconsideration, Petitioner discovered several irregularities. Said irregularities included, but were not limited to, omissions by his former counsel of several character affidavits from several clients whose funds were the subject of the charges brought which would have clearly confirmed for the court that the Petitioner that said clients held Petitioner in high esteem and were completely satisfied with the level of service rendered. Several letters from distinguished members of the legal community and community at large attesting to Petitioner's outstanding reputation in the community and veracity for truthfulness were also admitted despite his counsel's representation that said items would be included in their submissions. Petitioner also discovered that several items were wrongfully included in the court record that were to be excluded from the record by the Petitioner (e.g. portions of the deposition transcripts) pursuant to a stipulation entered into between the parties at the evidentiary hearing, omission of several bank records confirming that the Petitioner's escrow accounts had been closed and funds totally disbursed which would have exonerated Petitioner from several of the charges, and most glaringly, Petitioner's former counsel's failure to respond to Petitioner's Motion for the Imposition of Sanctions which was returnable on August 25, 2000. In fact, Petitioner's Counsel did not submit anything on Petitioner's behalf until December 2000, several months after the return date on the original motion. As confirmed in the Respondent's Opposition papers to said motion, Petitioner's Counsel had not obtained an extension of time to

submit said documents beyond September 2000. Said omissions and errors amounted to Petitioner not having the benefit of counsel during a critical stage of the pending matter in violation of his Constitutional, Sixth Amendment Right to Counsel, thereby adversely impacting upon the Appellate Division's review of the Petitioner's case.

The Appellate Division, Second Department, issued a one sentence decision dated August 7, 2001, denying the Petitioner's Motion for Reconsideration, despite all of the new evidence and arguments that were submitted to the court in the subject motion (A-8). Petitioner subsequently filed a Motion for Leave to Appeal to the New York State Court of Appeals. Said motion was denied as being untimely as set forth in the Decision and Order issued on October 23, 2001 by the New York State Court of Appeals (A-9).

Upon Petitioner filing a Motion for Leave to Reargue the October 23, 2001 Decision and Order, the Court of Appeals ruled that the original Motion for Leave to Appeal was timely, but dismissed that part of the Motion for Leave to Appeal seeking review of the underlying proceeding upon the ground that the "order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution." Said ruling is set forth in an Order rendered on January 15, 2002, which is the order that is the subject of this instant motion (A-10).

A subsequent Motion for Leave to Reargue was filed by the Petitioner, which included, inter alia, detailed argument as to why the August 7, 2002 Decision and Order was a "final order" within the meaning of the New York State Constitution and was therefore subject to review by the Court of Appeals. Said motion was denied by the Court of Appeals in an Order (without a decision) dated March 26, 2002 (A-11).

REASONS FOR GRANTING THE WRIT

2. Finality of the Appellate Division's August 7, 2001 Order. In its Order dated August 7, 2001, the New York State Supreme Court, Appellate Division denied Petitioner's Request for Reconsideration of the Sanction Imposed. Upon applying to the New York State Court of Appeals for Leave to Appeal, the Court of Appeals, upon discretionary review, denied the motion as being untimely. Upon Motion for Reargument, the Court held that the motion was timely, but denied that portion of the motion seeking Leave to Reargue based upon the grounds that the decision was not a final decision within the meaning of the Constitution. Upon motion for Reargument of said decision, the Court denied said motion, without a decision. Thus, the substance of the Petitioner's motions were never addressed by the Court of Appeals as result of the Court denying said motions based upon procedure, as well as discretionary review, as opposed to the merits of the arguments presented.

Petitioner respectfully submits that the ruling of the Court of Appeals on this issue was erroneous, and amounted to the denial of due process of the law in violation of the United States Constitution.

New York Constitution, Article VI, Sec. 3 (6), provides in relevant part that :

> Appeals may be taken to the Court of Appeals in civil cases from a judgment or order entered upon the decision of an Appellate Division of the Supreme Court which finally determines an action or special proceeding, but which is not appealable under paragraph 1 of this subdivision where the Appellate Division or Court of Appeals shall certify that in its opinion, a question of law is involved and ought to be reviewed by the Court of Appeals. Such an appeal may be allowed by application . . . or (b) directly to the Court of

Appeals. **Such an appeal shall be allowed when required in the interest of substantial justice."** (Emphasis added).

New York Civil Practice Law & Rules ("CPLR"), Sec. 5611 provides in relevant part that "if the appellate division disposes of all the issues in the action, its order shall be considered a final one..." It is also well established that the finality of an appellate division order dismissing an appeal to that court is determined by an examination of the finality of the underlying order (see Jacob and Valeria Langeloth Found. v. Dickerson Pond Assocs. 74 NY2d 841).

CPLR, Sec. 5501 "determines just how much is opened for review upon an appeal from a final judgment, and for this purpose, an order that amounts to the equivalent of a judgment in that it disposes of the whole case will also qualify as a judgment and earn the same scope of review." Siegel, New York Practice (3rd Ed., Sec. 530 at p.871-872). In this particular instance, it is clear that the Appellate Division's August 7, 2001 decision was final in that it disposed of all of the issues raised in the Motion for Reconsideration which were new, distinct and separate from the issues previously ruled upon in the Appellate Division's April 16, 2002 decision. As such, said decision is appealable to the Court of Appeals pursuant to CPLR, Sec. 5701 (2) and 2221(e). Moreover, in light of the newly discovered evidence and constitutional questions of law with state-wide implications which were raised for the first time in the contents of the aforesaid motion, it is clear that the Appellate Division's ruling on said facts and issues constituted a "new" final ruling within the meaning of the statute.

It has been also held that the Court of Appeals may review the facts when the Appellate Division in reversing a final order in special proceeding makes new findings of fact, and where such findings are not separately stated, they may be implied. People v. Parkin, 263 N.Y.428, 189 N.E. 480. In this instance, although the prior ruling was not reversed as in Parkin, id.,

by implication, a new set of findings were made as to the new evidence submitted, and as such, it is subject to appeal to the Court of Appeals pursuant to the relevant statute and case law in the State of New York.

Based upon a clear demonstration of the material omissions by the Petitioner's Counsel in the underlying proceedings, particularly counsel's failure to submit a Proposed Findings of Facts to the referee hearing the matter, as well as failing to respond to the Petitioner's Motion for the Imposition of Sanctions, the "best interests of substantial justice" dictate that Petitioner should have been granted appellate review of the irregularities that have effectively denied him his constitutional right to counsel as provided by the Sixth Amendment to the United States Constitution, as well as the decision which has effectively deprived him of his livelihood and ability to support his family. Moreover, the court's denial of judicial review of the

3. Unequal Dispensation of Justice With Nationwide Implications. Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, states have the right to regulate businesses, including the professional licensing and conduct of attorneys. However, inherent in the state's authority to exercise its police powers is the responsibility to be reasonable and not arbitrary in the promulgation, as well as application of said regulations. In this instance, it is apparent from the inconsistent dispensation of sanctions for escrow account infractions by the New York State Courts, that the state has overlooked this fundamental constitutional premise.

In this particular instance, as previously outlined in the Petitioner's Motion for Reconsideration addressed to the Appellate Division, it is clear that there is an inconsistent application of the law when it comes to the imposition of sanctions relating to escrow account violations where no one has been harmed or has complained of the attorney who is the subject of the inquiry. Said sanctions have varied anywhere from public censure to

disbarment for the same infractions, depending upon the judicial district the matter is pending. In some instances, the same judicial district has imposed a various degree of sanctions for the same infractions, as in the Second Judicial Department, the Department issuing the underlying decision that is the subject of this instant motion. Variations in the application of severity of sanctions for similar infractions have been also prevalent throughout the United States. Without a clear pronouncement as to the level of sanctions to be imposed in such instances, the unequal imposition of sanctions for the same or similar infractions will continue to proliferate throughout the various judicial departments in the State of New York, as well as throughout the nation in violation of the equal protection clause of the United States Constitution.

It is well established that the strong sanction of disbarment is readily applied in most jurisdictions, particularly in the Second Judicial Department of New York State , when an attorney has committed escrow violations to the detriment of his clients. See In re Perez, 645 N.Y.S.2d 859, 223 A.D.2d 330 (App. Div. 2d Dept. 1996), wherein attorney was disbarred when he failed to promptly deliver funds or property to which client was entitled, failed to account for funds entrusted to him, failed to cooperate with grievance committee, defaulted in answering charges of professional misconduct; Matter of DiMisa, 639 N.Y.S.2d 835, 218 A.D.2d 441 (App. Div. 2d Dept. 1996), attorney disbarred who *failed to return any portion of downpayment* for real estate transaction entrusted to him and failed to promptly deliver to his client funds which had been entrusted to him as a fiduciary; *In the Matter of William Geier*, 709 N.Y.S.2d 195, 274 A.D.2d 103 (App. Div. 2d Dept. 2000), holding attorney who converted escrow funds to the detriment of his client was disbarred.

When determining the appropriate sanction to be imposed against a Petitioner for escrow account violations, historically, there are a number of different factors that the court examines in mitigation, including, but not

limited to: venality, cooperation with the petitioner's investigation, contrition, remorse, harm to client, seriousness of violation, prior history, likelihood of infraction recurring, character letters, circumstances impacting upon the Petitioner's actions, etc. The precedents in the Second Judicial Department indicate that the Second Judicial Department has a history, of imposing sanctions ranging from public censure to disbarment in the most serious cases of escrow violations when the client has been harmed, as noted above. Also see *In the Matter of Robert G. Whiteman*, 651 N.Y.S.2d 555, 226 A.D.2d 20 (App. Div. 2d Dept. 1996), holding that Petitioner attorneys, who converted funds entrusted to them on behalf of a client, failed to maintain required records for their attorney IOLA account and failed to properly file retainer closing statements with the Office of Court Administration, are guilty of professional misconduct, and, in consideration of the evidence offered in mitigation, they are censured; *In the Matter of Kenneth Popper*, 709 N.Y.S.2d 579, 274 A.D.2d 28 (App. Div. 2d Dept. 2000), holding Petitioner's mishandling of escrow account warranted censure, in light of attorney's candor and cooperation, his expressed remorse, total lack of venality of his mistake, his immediate action in covering shortfall in his escrow account, absence of any prior disciplinary history, unlikelihood that such conduct would ever be repeated and substantial other evidence offered in mitigation. *In the Matter of Scattaretico-Naber*, 682 N.Y.S.2d 67, (App. Div. 2d Dept. 1998), holding that attorney's failure to designate her special account as escrow account, to maintain required bookkeeping records related to her special account, to safeguard funds that were entrusted to her to be held in escrow, and her commingling of personal and client funds warranted censure, in light of attorney's cooperation with disciplinary investigation, expressed remorse, corrective actions and previously unblemished record and fact that rule violations were technical, unintentional, and harmed no clients; *In the Matter of Robert J. Ponzini*, 694 N.Y.S.2d 127, 259 A.D.2d 142, opinion corrected on reargument, 701 N.Y.S.2d 911, 268 A.D.2D 478 (App. Div. 2d Dept. 2000), and *In the Matter of Robert W. Spencer*, 694 N.Y.S.2d 426m 259 A.D.2d 218m opinion corrected on reargument, 268 A.D.2d 481

(App. Div. 2d Dept. 2000), holding that disbarment was "excessive discipline" because of the absence of any monetary loss to clients for letting escrow accounts fall to below zero, wherein both attorneys failed to oversee record keeping of their firm's escrow account on multiple occasions and causing or failing to prevent deposit of funds held on behalf of other persons when account had a negative balance which adversely reflected upon their fitness to practice law, where attorneys knew or should have known that deposit of such funds while account had a negative balance would result in consumption or conversion of part or all of such funds. The sanction imposed was a one year suspension; *In the Matter of Gambino*, 619 N.Y.S.2d 305, 205 A.D.2d 305 (App. Div. 2d Dept. 1994) holding that one year suspension was appropriate where Petitioner's misconduct included failing to maintain a duly constituted escrow account, commingling funds of clients and others with personal funds, failing to designate sufficiently his attorney escrow account, making withdrawals to cash from attorney escrow account and failing to maintain and/or produce records for attorney escrow account, and failing to account for interest on funds held in escrow; *In the Matter of Wynne*, 260 A.D.2d 23, holding Petitioner attorney who failed to properly maintain his escrow account, improperly converted funds entrusted to him as a fiduciary, is guilty of professional misconduct and upon consideration of factors in mitigation, including Petitioner's remorse and lack of venality, his previously unblemished record, his cooperation with the grievance committee's investigation, and character letters submitted on his behalf, Petitioner was suspended for a period of two years; Matter of Forman, 680 N.Y.S.2d 612 (App. Div. 2d Dept. 1998), holding that attorney's conduct in failing, on multiple occasions, to safeguard funds entrusted to him as a fiduciary and in improperly commingling his personal funds with funds entrusted to him as a fiduciary warranted a suspension from practice of law for a two year period, given the circumstances, including attorney's unblemished record, his cooperation with investigation, lack of harm to clients, changes in attorney's office staff and escrow procedures and overwhelming character evidence.

In this case at bar, despite the numerous charges brought against the Petitioner for escrow account violations, there has been no finding of venality made by the court. Moreover, Petitioner has fully cooperated with the Petitioner's investigation that lasted more than four (4) years, Petitioner has expressed considerable remorse and contrition for his actions, no client has complained of Petitioner, no client has been harmed or prejudiced in any manner by Petitioner's actions, Petitioner has clearly demonstrated and admitted to his lack of understanding and/or experience on the proper use of an escrow account at the time of the infractions (1994-1996). The Referee hearing the matter also classified the actions of Petitioner as "mistakes" which was acknowledged by the Appellate Division in their decision. Petitioner also submitted numerous Affirmations and Character letters from distinguished members of the bench, including the Honorable George Bundy Smith from the New York State Court of Appeals, Honorable Clark Richardson, Supervising Judge of the New York State Family Court, Bronx County, Honorable Priscilla Hall, New York State Supreme Court, Kings County, Honorable Louis Barone, New York State Supreme Court, Westchester County, and Honorable Doris Ling-Cohen, New York City Civil Court. The Honorable Theodore Jones, New York State Supreme Court , and the Honorable Harvey Sklaver, retired Judge of the New York State Family Court, Bronx County, who is also Petitioner's former employer, also testified at Petitioner's hearing attesting to his good character and reputation in the community. Character affirmations and affidavits were also submitted from various bar and community leaders who are acquainted with Petitioner's work, good character and commitment to servicing of the indigent, including, but not limited to, C. Virginia Fields, Manhattan Borough President, Dean John Feerick, Dean of Fordham Law School and former President of the Association of the Bar of the City of New York, Roslyn Fink, Esq., former President of the New York County Lawyers Association, Norman Reimer, Esq., Vice President of the New York County Lawyers Association, Renaye Cuyler, Esq., President of the Metropolitan Black Bar Association, Arlene Gordon Oliver, Esq., a partner in a reputable firm in Westchester County and

President of the Westchester County Black Bar Association, Ann Takahashi, Director of the Youth Empowerment for Success, a program run by the Children's Aid Society in collaboration with the New York State Family Court, Kings County, as an alternative to incarceration for youth. Several clients whose funds were the subject of the instant action also submitted character affidavits on Petitioner's behalf attesting to his good character and reputation, including, Dr. Farida Ali, Ed Oliver, Shirley Gray and Guillermo Brown. Petitioner also submitted evidence of his exceptional service to the bar and community including, but not limited to, serving as delegate to the Judicial Screening Panel for the Metropolitan Black Bar Association ("MBBA") and the Association of the Bar of the City of New York, (1990-1991 & 1998-1999), President of the MBBA (1993-1994), Delegate to the Network of Bar Leaders (1993-1994),Vice Chairman of the Board of Directors of the MBBA (1994-1996), Vice Chairman of the Advisory Board of Directors for the New York Urban League, Manhattan Branch (1994-1996), Chairman of the Board of the Advisory Board of the New York Urban League, Manhattan Branch (1996-1998), member of the Central Board of Directors for the New York Urban League (1995-1998) member of the Board of Trustees and member of several standing committees for the New York County Lawyers Association (1997-2000), member of the Board of Directors for Manhattan Neighborhood Network, Manhattan's Public Access Television (1999-Present). Petitioner has also served as a volunteer and mentor to several organizations, including, but not limited to "The Door" a non-profit organization providing services and housing to drug addicts and prostitutes, Practicing Attorneys and Law Students (P.A.L.S.), Youth Empowerment for Success, an alternative program to incarceration for troubled youth, Harlem Dowling Westside Center for Children, Association of the Bar of the City of New York's Haitian Asylum Project wherein Petitioner was featured in a video moderated by the Honorable Judith Kaye, the Chief Judge of the New York State Court of Appeals as an example of the bar's commitment to servicing the indigent at the Association of the Bar's 125th Anniversary at Lincoln Center. He has been also an active contributing member to several

standing committees in the Association of the Bar (Council on International Affairs, Women in the Courts, Federal Task Force on Race and Gender in the Courts, Minority Lateral Recruitment Conference, co-founder, Lawyers In Transition, etc.) New York County Lawyers Association, as well as the MBBA. He has served as a coordinator, panelist and moderator for several continuing legal education programs sponsored by various bar associations.

Given his short tenure as a member of the bar, it is clear that Petitioner's commitment and contributions to the bar and the community are exemplary and exceeds the amount of contributions made by a majority of his peers during their entire career. Petitioner also submitted several supplemental letters, Character Affirmations from his Pastors, Pastors Clinton and Sarah Utterbach, and several practicing attorneys and lay persons attesting to his good character and reputation in the community.

Despite the presentation of these various letters, affirmations and affidavits attesting to Petitioner's good character and reputation, a partial listing of his many contributions to the legal community and community at large, coupled with the fact that no one was harmed or complained of the Petitioner, his clear expression of remorse, contrition, cooperation with the Petitioner's investigation, lack of any finding of venality, inexperience in handling escrow accounts, years of work in the public sector, lack of likelihood that said transgressions will be repeated, lack of any personal profit from his misconduct and judicial precedents that have imposed lesser sanctions than that imposed herein, Petitioner was given the severe sanction of disbarment. Said sanction varies from the established precedents in the Second Judicial Department for similar infractions as well as throughout the State of New York. Moreover, many of the precedents that imposed a much lesser sanction, did not have many of the mitigating factors present that the Petitioner has herein. See *In the Matter of Robert G. Whiteman*, Id.; *In the Matter of Robert J. Ponzini*, 694 N.Y.S.2d 127, 259 A.D.2d 142, opinion corrected on reargument, 701 N.Y.S.2d 911, 268 A.D.2D 478 (App. Div. 2d Dept. 2000), Id.; *In the Matter of Gambino*,

619 N.Y.S.2d 305, 205 A.D.2d 305 (App. Div. 2d Dept. 1994).

The sanction imposed against the Petitioner in the instant matter for mishandling his escrow account also appears to vary from the precedents established in several other jurisdictions throughout New York State, including the First Judicial Department. See *In re Hartman*, 694 N.Y.S.2d 34 (App. Div. 1st Dept. 1999), holding that attorney's neglect of legal matter, failure to preserve client funds in attorney escrow account, writing of three checks to cash from that account, failing to cooperate with the Disciplinary Committee's investigation, warranted public censure where all attorney's misconduct lacked venality, and where attorney was committed to maintaining a scaled down law practice from her home; *In re Byler*, 712 N.Y.S.2d, 500 (App. Div. 1st Dept. 2000) holding attorney's misconduct in obtaining a tax refund for a client and retaining it for his personal use instead of returning it to the client or depositing it in escrow and in failing to promptly pay the client those funds in his possession when the client objected to the attorney paying the money to himself warranted a one year suspension; *In re Terzis*, 712 N.Y.S.2d 99 (App. Div. 1st Dept. 2000), holding a one year suspension, which was the same sanction imposed in Connecticut, was appropriate reciprocal discipline for attorney who negligently misappropriated condominium association funds while serving as association president; In re Munzer, 697 N.Y.S.2d 49 (App. Div. 1st Dept. 1999), holding, attorney's admitted conversion of client funds being held in his escrow account warranted a one year suspension given his return of the converted funds before they were required in a real estate transaction, given character evidence demonstrating his reputation for competence and integrity, great personal stress and expression of great remorse and shame for having invaded escrow; In the Matter of Rabin, 667 N.Y.S.2d 368, 239 A.D.2d 368 (App. Div. 1st Dept. 1998), imposing a two year suspension upon an attorney who improperly withdrew funds from law firm's special account to pay business and personal expenses, writing checks to cash from special account, and failing to return client funds in light of mitigating facts that mishandling funds was result of

carelessness, rather than intent to convert and Petitioner's unblemished record. In re Albanese, 710 N.Y.S.2d 594 (App. Div. 1st Dept. 2000), holding attorney's intentional conversion of client funds, intentional submission to court of dishonest and misleading affirmation, conduct prejudicial to the administration of justice, failure to maintain identity of escrow funds and commingling of personal and escrow funds, failure to maintain escrow records and records for his operating account warranted a four year suspension given the mitigating circumstances and apparent malevolent intent of complainant.

The Third and Fourth Judicial Departments are also at variance with the imposition of sanction of disbarment in the instant case resulting from the mishandling of his escrow account. See In re Joseph, 637 N.Y.S.2d 490, 223 A.D.2d 999 (App. Div. 3d Dept. 1996), later proceeding 654 N.Y.S.2d 476, holding attorney who seriously mismanaged his escrow accounts, thereby violating various provisions of McKinney's Code of Professional Responsibility would be censured as a result of several mitigating factors, including personal problems, his role as a corporate officer as contributing to his inattention to proper management of his escrow accounts, no harm to any clients, affidavits of good character and participation in the department's Law Guardian Program and professed remorse; In re MacKinnon, 637 N.Y.S.2d 321, 223 A.D.2d 807 (App. Div. 3rd Dept. 1996), holding censure was appropriate penalty where attorney commingled client and personal funds in his escrow account, failed to maintain adequate books and records for his client escrow account, failed to limit business relations with clients by making loans to clients without full disclosure in light of mitigating factors that included no harm to any client, escrow deficiencies resulted from poor bookkeeping rather than venal motive, affirmative steps to assure future compliance, good reputation and unblemished disciplinary record.

Petitioner respectfully submits that without the granting of a Writ for Certiorari by the Honorable Court herein, it is likely that the inconsistent application of the imposition of sanctions for escrow account infractions will continue in contradiction of the judicial goal of eliminating

"confusion into the body of law from the frequent recurrence of occasions where the same question will come up, the public interest and the interests of jurisprudence would justify, and perhaps, require the granting of a certificate" (of appeal). Sciolina v. Erie Preserving Company, 151 N.Y. 50, 53.

CONCLUSION

Given the inconsistent application of the sanctions for mishandling attorney escrow accounts as applied herein by the Second Judicial Department of the State of New York and by several different judicial departments as set forth in the case law noted herein, the denial of due process, ineffective assistance of counsel and nationwide implications based upon a lack of clear pronouncement of the standard of law to be applied in similar instances, Petitioner respectfully requests that a Writ of Certiorari be granted by this Honorable Court in the interests of substantial justice, and for such other and further relief as this Honorable Court may deem proper and just.

Respectfully submitted.

ANDREW G. MALONEY

Petitioner- Pro Se
54 Salem Road
White Plains, N.Y. 10603
(914) 347-5117

April, 2002

(2)

Supreme Court, U.S.
FILED

011881 APR 15 2002

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

ANDREW G. MALONEY,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

APPENDIX

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62 pp

DECISION AND ORDER OF THE APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED DECEMBER 27, 1999

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
LAWRENCE J. BRACKEN
SONDRA MILLER
CORNELIUS J. O'BRIEN
GABRIEL M. KRAUSMAN, JJ.

1999-10864

In the Matter of Andrew G. Maloney, an attorney and counselor-at-law.

Grievance Committee for the Ninth Judicial District,

petitioner;

Andrew G. Maloney,

respondent.

DECISION & ORDER ON MOTION

Motion by the Grievance Committee for the Ninth Judicial District for an order (1) suspending the respondent from the practice of law for an indefinite period and until further order of this court, based upon his substantial

admissions under oath that he has committed acts of professional misconduct and other uncontroverted evidence of professional misconduct, (2) authorizing the institution and prosecution of a disciplinary proceeding, (3) directing the respondent to answer the petition, dated November 18, 1999, within 10 days after service upon him of this order, and (4) referring the matter to a Special Referee to hear and report. The respondent was admitted to the practice of law at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on February 8, 1989, under the name Andrew Gerald Eardley Maloney.

Upon the papers submitted in support of the motion and the papers submitted in opposition thereto, it is

ORDERED that the branch of the motion which was to immediately suspend the respondent from the practice of law is denied; and it is further,

ORDERED that the branches of the motion which were to authorize the institution and prosecution of a disciplinary proceeding, direct the respondent to answer the petition, and refer the matter to a Special Referee are granted; and it is further,

ORDERED that the Grievance Committee for the Ninth Judicial District is hereby authorized to institute and prosecute a disciplinary proceeding in this court, as petitioner, against Andrew G. Maloney, as respondent, based upon the acts of professional misconduct set forth in the petition; and it is further,

ORDERED that Gary L. Casella, Chief Counsel to the Grievance Committee for the Ninth Judicial District, 399 Knollwood Road, White Plains, New York 10603, is hereby appointed as attorney for the petitioner in such proceeding; and it is further,

ORDERED that the respondent shall serve an answer to the petition, dated November 18, 1999, upon the petitioner and the Special Referee and shall file a copy of the same with this court within 10 days after his receipt of this order; and it is further,

ORDERED that the issues raised by the petition and any answer thereto are referred to the Honorable Jerome M. Becker, a former Judge of the Criminal and Family Courts, 641 Lexington Avenue, 4th Fl., New York, N.Y. 10022, as Special Referee to hear and report, together with his findings on the issues.

MANGANO, P.J., BRACKEN, S. MILLER, O'BRIEN, and KRAUSMAN, JJ., concur.

s/ JAMES EDWARD PELZER
James Edward Pelzer
Clerk

OPINION AND ORDER OF THE APPELLATE DIVISION DATED APRIL 16, 2001

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

LAWRENCE J. BRACKEN, P.J.
CORNELIUS J. O'BRIEN
FRED T. SANTUCCI
MYRIAM J. ALTMAN
GABRIEL M. KRAUSMAN, JJ.

1999-10864

In the Matter of Andrew G. Maloney, an attorney and counselor-at-law.

Grievance Committee for the Ninth Judicial District,

petitioner;

Andrew G. Maloney,

respondent.

OPINION & ORDER

DISCIPLINARY proceeding instituted by the Grievance Committee for the Ninth Judicial District. The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on February 8, 1989, under the name Andrew Gerald Eardley

Maloney. By decision and order of this court dated December 27, 1999, the matter was referred to the Honorable Jerome M. Becker, as Special Referee to hear and report.

Gary L. Casella, White Plains, N.Y. (Gloria A. Bunze of counsel), for petitioner.

Jerome Karp, P.C., Brooklyn, New York, for respondent.

The respondent was served with a petition containing 75 charges of professional misconduct. Charges 43, 71, 74, and 75 were withdrawn during the course of the disciplinary proceeding, and Charges 7, 13, 14, 17, 18, and 20 through 23 were amended before the hearing. In his answer, the respondent admitted most of the factual allegations of the petition, but denied that he was guilty of any professional misconduct. At the hearing, the Grievance Committee's case consisted of 48 exhibits and the testimony of two witnesses. The respondent called three character witnesses and testified on his own behalf. In addition, he introduced one exhibit into evidence and submitted 12 character affidavits. At the conclusion of the hearing, the Special Referee sustained all of the remaining charges. The Grievance Committee now moves to confirm the Special Referee's report. The respondent cross moves to confirm, in part, and disaffirm, in part, the Special Referee's report.

Charges 2, 19, 32, 34, 37, 40, and 50 allege that the respondent breached his fiduciary duty by making withdrawals from an escrow account to cash and not to a named payee, in violation of Code of Professional Responsibility DR 9-102(e) (22 NYCRR 1200.46[e]).

Appendix

Charge 4 alleges that the respondent entered into an improper business relationship with a client, in violation of Code of Professional Responsibility DR 5-104(a) (22 NYCRR 1200.23[a]), and/or engaged in conduct adversely reflecting on his fitness as a lawyer, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

Charge 7 alleges that the respondent engaged in conduct adversely reflecting on his fitness as a lawyer, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]), by breaching his agreement to repay, upon request, a loan from a client's escrow funds.

Charge 9 alleges that the respondent breached his fiduciary duty by failing to maintain and/or produce required bookkeeping records, in violation of Code of Professional Responsibility DR 9-102(d)(1), (2), and (9) (22 NYCRR 1200.46[d][1], [2], and [9]).

Charges 12, 39, 42, 52, 65, and 66 allege that the respondent failed to maintain a duly-constituted escrow account by commingling an earned fee or personal funds with the funds of clients and/or others, in violation of Code of Professional Responsibility DR 9-102(a) (22 NYCRR 1200.46[a]).

Charges 13, 17, 31, 36, 38, 46, 47, 48, 49, 51, 53, 54, 56, 57, 58, 59, 64, and 68 allege that the respondent breached his fiduciary duty by misappropriating client funds with which he was entrusted, in violation of Code of Professional Responsibility DR 9-102(a) (22 NYCRR 1200.46[a]), and/or

engaged in conduct adversely reflecting on his fitness as a lawyer, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

Charges 8, 10, 16, and 25 through 30 allege that the respondent breached his fiduciary duty by disbursing an escrow check when he did not have funds on deposit to cover the check or before the corresponding deposit cleared, in violation of Code of Professional Responsibility DR 9-102(a) (22 NYCRR 1200.46[a]), and/or engaged in conduct adversely reflecting on his fitness as a lawyer, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

Charges 41, 44, and 62 allege that the respondent breached his fiduciary duty by disbursing more funds than he had on deposit for a particular client, adversely reflecting on his fitness as a lawyer, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3 [a][7]).

Charge 55 alleged that the respondent breached his fiduciary duty by transferring funds from one escrow account to another in order to cover a negative balance in the receiving account which adversely reflects on his fitness as a lawyer, in violation of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]).

Based on the evidence adduced at the hearing, including the respondent's admissions, we find that all of the foregoing charges are sustained. We also find that Charges 3, 24, 45, 63, 67, and 72 are sustained only insofar as they alleged that the respondent engaged in conduct adversely reflecting on

his fitness as a lawyer, in violation of Code of Professional Responsibility DR 1-102(a) (7) (22 NYCRR 1200.3 [a][7]). The remaining charges are not sustained.

In determining the appropriate measure of discipline to impose, the respondent asks the court to consider, *inter alia*, that the Special Referee made no finding of venality, characterized the respondent's misconduct as "mistakes", and was impressed with the respondent's Bar and community service activities (which are numerous). The respondent also asks the court to consider that his clients were not harmed, that he was contrite, and that he expressed remorse for his misconduct.

The respondent's prior disciplinary history consists of a letter of admonition from the Westchester County Bar Association.

The respondent is guilty of serious professional misconduct that warrants his disbarment.

BRACKEN, P.J., O'BRIEN, SANTUCCI, ALTMAN and KRAUSMAN, JJ., concur.

ORDERED that the Grievance Committee's motion to confirm and the respondent's cross motion to confirm, in part, and disaffirm, in part, the Special Referee's Report are determined as follows: Charges 3, 24, 45, 63, 67, and 72 are sustained only insofar as they allege violations of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]); Charges 1, 5, 6, 11, 14, 15, 18, 20 through 23, 33, 35, 60, 61, 69, 70, and 73 are not sustained; and the remaining charges are sustained; and it is further,

Appendix

ORDERED that pursuant to Judiciary Law § 90, effective immediately, the respondent, Andrew G. Maloney, is disbarred and his name is stricken from the roll of attorneys and counselors-at-law; and it is further,

ORDERED that the respondent shall promptly comply with this court's rules governing the conduct of disbarred, suspended, and resigned attorneys (*see*, 22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law § 90, effective immediately, Andrew G. Maloney is commanded to desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law.

ENTER:
JAMES EDWARD PELZER
James Edward Pelzer
Clerk

DECISION AND ORDER ON MOTION OF THE APPELLATE DIVISION DATED AUGUST 7, 2001

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

LAWRENCE J. BRACKEN, P.J.
CORNELIUS J. O'BRIEN
DAVID S. RITTER
FRED T. SANTUCCI
GABRIEL M. KRAUSMAN, JJ.

1999-10864

In the Matter of Andrew G. Maloney, a disbarred attorney.

Grievance Committee for the Ninth Judicial District,

petitioner;

Andrew G. Maloney,

respondent.

DECISION & ORDER ON MOTION

Motion by the respondent for leave to reargue an opinion and order of this court dated April 16, 2001, which disbarred him, and, upon reargument, to modify the discipline imposed.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

BRACKEN, P.J., O'BRIEN, RITTER, SANTUCCI and KRAUSMAN, JJ., concur.

ENTER:

JAMES EDWARD PELZER
James Edward Pelzer
Clerk

ORDER OF THE NEW YORK STATE COURT OF APPEALS DATED OCTOBER 23, 2001

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of October 2001

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-24 Mo. No. 1199

In the Matter of Andrew G. Maloney, an attorney and counselor-at-law.

Grievance Committee for the Ninth Judicial District,

Respondent;

Andrew G. Maloney,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix

ORDERED, that the said motion be and the same hereby is dismissed as untimely (*see*, CPLR 5513[b]). Judge Smith took no part.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

ORDER OF THE NEW YORK STATE COURT OF APPEALS DATED JANUARY 15, 2002

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of January 2002

STATE OF NEW YORK
COURT OF APPEALS

PRESENT, HON. JUDITH S. KAYE, *Chief Judge*, presiding.

2-24 Mo. No. 1364

In the Matter of Andrew G. Maloney, an attorney and counselor-at-law.

Grievance Committee for the Ninth Judicial District,

Respondent;

Andrew G. Maloney,

Appellant.

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for reargument of so much of appellant's prior motion as sought leave to appeal

from an Appellate Division order denying reconsideration, which was dismissed as untimely by this Court on October 23, 2001, be and the same hereby granted and, upon reargument, that part of the motion for leave to appeal is dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution.

Judge Smith took no part.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

ORDER OF THE NEW YORK STATE COURT OF APPEALS DATED MARCH 26, 2002

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-sixth day of March 2002

STATE OF NEW YORK,
COURT OF APPEALS

PRESENT, HON. JUDITH S. KAYE, *Chief Judge*, presiding.

2-24 Mo. No. 260

In the Matter of Andrew G. Maloney,
a Disbarred Attorney.

Grievance Committee for the Ninth Judicial District,

Respondent;

Andrew G. Maloney,

Appellant.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Judge Smith took no part.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

NOTICE OF MOTION FOR RECONSIDERATION OF SANCTION IMPOSED DATED MAY 16, 2001

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND DEPARTMENT

In the Matter of ANDREW G. MALONEY, an Attorney and Counselor-at-Law

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

ANDREW G. MALONEY,

Respondent.

(Admitted under the name Andrew Gerald Eardley Maloney)

NOTICE OF MOTION FOR RECONSIDERATION OF SANCTION IMPOSED

Sirs:

PLEASE TAKE NOTICE, that upon the annexed Affidavit of Andrew G. Maloney, dated May 16, 2001, the exhibits annexed hereto, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a Motion Term therefore, at the Courthouse located

at 45 Monroe Place, Brooklyn, New York, on the 1st day of June 2001, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order (1) granting leave to reargue the Decision and Order of this Court dated April 16, 2001; (2) and in the event such leave is granted, modifying the discipline imposed upon the respondent in the Decision and Order of this Court dated April 16, 2001; (3) staying respondent's disbarment from the practice of law pending the determination of respondent's application and (4) for such other and further relief as may be just and proper.

Dated: Brooklyn, New York
May 16, 2001

AFFIDAVIT OF ANDREW G. MALONEY IN SUPPORT OF MOTION FOR RECONSIDERATION OF SANCTION IMPOSED

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of ANDREW G. MALONEY, an Attorney and Counselor-at-Law

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

ANDREW G. MALONEY,

Respondent.

(Admitted under the name Andrew Gerald Eardley Maloney)

TO: HON. LAWRENCE J. BRACKEN,
PRESIDING JUSTICE
HON. CORNELIUS J. O'BRIEN
HON. FRED T. SANTUCCI
HON. MYRIAM J. ALTMAN
HON. GABRIEL M. KRAUSMAN, JJ

Appendix

AFFIDAVIT OF ANDREW G. MALONEY IN SUPPORT OF MOTION FOR RECONSIDERATION OF SANCTION IMPOSED

I, ANDREW G. MALONEY, being duly sworn, hereby state under the penalties of perjury:

Respondent, ANDREW G. MALONEY, hereby respectfully submits this Affidavit in Support of Motion for Reconsideration of the Sanction of Disbarment issued by the Court herein in its order dated April 16, 2001, court resulting from charges brought the Grievance Committee for the Ninth Judicial District. It should be noted that the charges brought emanate from a sua sponte investigation commenced in 1996 by the Disciplinary Committee for the First Judicial Department. In 1998 the pending matter was transferred to the Ninth Judicial District who brought the instant action in November 1999.

On or about November 1999, Respondent was served with a motion for interim suspension based upon several improprieties which were the subject of a sua sponte investigation. By Order dated December 27, 2001, the Appellate Division, Second Department denied the Motion for Interim Suspension and appointed Jerome H. Becker as Special Referee to hear and report his findings on the issues raised. By Report dated July 19, 2000, the Special Referee sustained all charges then pending.

Based upon the review of the following information in mitigation, Respondent prays that the court will reconsider the severity of the sanction imposed for the offenses committed and impose a sanction that is more consistent with the prior precedents held by the court herein.

Appendix

CHECKS TO CASH

In several instances, Respondent has been charged with writing checks to cash on his escrow account. Respondent respectfully submits that it is clear from the charges brought against Respondent, Respondent did not have a true understanding as to the proper use of an escrow account. Having opened an IOLA account in or about June 1994, Respondent did not have any formal training regarding its use. In fact, in his initial deposition before the Petitioner, held on July 15, 1997, Respondent testified at page 27, line 17:

> Q: Was there any particular reason why you wrote this check to cash?
>
> A: I had a misunderstanding of the way it was supposed to be done. My understanding was as long as the face of the check clearly indicated what it's for, that it's O.K. to write it payable to cash.

Page 28, Line 3, Respondent further asserts:

> Q: . . . . did you know when you wrote this check, at the time, that you're not supposed to write a check to cash for an IOLA account?
>
> A: No, I did not.
>
> Q: And should I infer from your answer that at some point you did learn that you're not supposed to do that?

A: After speaking with you ma'am, yes.

Q: Oh, O.K.

A: I mean, even up 'til as recently as two months ago, I honestly did not know.

No evidence was presented by Petitioner to contradict this testimony. Nonetheless, the Judicial Hearing Officer (hereinafter referred to as "J.H.O."), did not give any credence to Respondent's testimony confirming that he was not knowledgeable on the proper procedure for writing checks from his IOLA account.

While it is a general precept that ignorance of the law is no excuse for violating it, in mitigation, Respondent respectfully requests that this Honorable Court consider the Respondent's lack of knowledge regarding the true operation of an escrow account, the fact that no one was harmed by Respondent writing several checks to "cash" as set forth in Charges 2, 19, 32, 34, 37, 40 and 50. Respondent also fully cooperated with the Petitioner's investigation which began more than five (5) years ago, there has been no finding of venality by the J.H.O. hearing this matter and no client complained of the Respondent. It is also requested that the Court herein temper the imposition of its sanction for the violations referenced herein.

CHARGE 4 & 7

Charge 4, which was sustained against Respondent, avers that Respondent "engaged in overreaching by entering into an unsecured, undocumented, interest free loan agreement

with a client and failed to repay the loan promptly upon request. In requesting that the Court herein reconsider the level of the sanction imposed for this violation, Respondent respectfully requests that the court take notice of the fact that as testified to at the hearing and during the various depositions which took place in 1997 and 1998, the client, Mr. Brown was not a lay person, but a professional banker, skilled at making his own assessments in extending loans, particularly as a loan officer for a reputable savings bank. In this instance, a loan was extended to the Respondent and the Respondent was given considerable latitude in the repayment of said loan. There has been no evidence presented by the Petitioner at trial to establish otherwise. In fact, Mr. Brown submitted an Affidavit in Support of Respondent's Opposition papers requesting that Petitioner's Motion for interim Suspension be denied. A copy of said Affidavit wherein Mr. Brown acknowledges "receipt of payment as per our agreement" is annexed hereto and included herein as Exhibit "A". Thus, it is respectfully submitted that Charge 4 & 7 should not be sustained, or alternatively, the sanction imposed for said violation be tempered, particularly in light of Mr. Brown's Affidavit of support noted herein.

CHARGE 8

Respondent has been charged with disbursing a check when he did not have corresponding funds on deposit in the account to cover the check. In Reconsideration of the severity of the sanction imposed therein, Respondent respectfully requests that the court notes that the check was presented to Mr. Brown with the understanding that he would not deposit same until oral or written confirmation was given that the

corresponding funds were on deposit. The uncontroverted testimony at trial deduced that the check was deposited by a third party who was not privy to the agreement. In hindsight, Respondent realizes that this was an exercise of bad business judgment, but it was in no manner designed to mislead or misrepresent to the client, Mr. Brown, as to the status of the check tendered.

CHARGE 9

Respondent has been charged with failing to produce a check register beginning from 1994. Respondent respectfully submits that he presented Petitioner with all documents that he was able to locate for the relevant period in question, including the files for Mr. Brown, which included a copy of all checks issued from the IOLA account relating thereto. Respondent notes that he had been required to relocate his practice twice since 1994 which compounded his ability to locate the original ledger.

SHIRLEY GRAY MATTER

CHARGE 10

Charge 10, which was sustained by the court herein avers that Respondent disbursed a check to a vendor on behalf of his client, Shirley Gray without having the corresponding funds on deposit, thereby violating DR 9-1-2(a). Respondent respectfully submits that the J.H.O. hearing this matter gave little or no credence to Respondent's testimony wherein he testified that the check was forwarded to Attorney Bill McMullan's office with the understanding that the funds to

cover said check would be deposited simultaneously with the issuance and delivery of the check. During this transaction which occurred in 1996, it was implicitly indicated to Mr. McMullan's office that the check should not be deposited until they received a telephone call confirming that the funds had been deposited. In fact, Mr. McMullan submitted an Affirmation which was annexed as Exhibit "A" in Respondent's Affidavit in Opposition to Petitioner's Motion for Interim Suspension. A copy of said document is annexed hereto as Exhibit "B". In said Affirmation, Mr. McMullan confirms that he received a call from Respondent on the date said check was presented to the bank, which is the same day it was received, wherein Respondent indicated that he had been tied upon in court and would be depositing the funds to cover the check later that same day. Mr. McMullan further indicated that "Mr. Maloney has been always forthright regarding the disposition of any funds tendered to my office on behalf of his client and I do not believe Mr. Maloney intended to defraud my office in any way by issuing an invalid check." The funds were indeed deposited on the same day, but not before a member of Mr. McMullan's staff presented said check for payment to Mr. Maloney's bank. In mitigation, it is respectfully requested that the court take judicial notice that no one was harmed by this transaction. Moreover, during said period, Respondent was involved in a protracted criminal and federal court matter that impeded his ability to make a more timely deposit. Ms. Shirley Gray, the client on whose behalf the payment was tendered, has submitted an Affidavit in Support of Respondent which was previously submitted to the court herein. Based upon afore-referenced factors, it is respectfully requested that the severity of the sanction imposed by the court herein be tempered.

Appendix

CHARGE 12

Respondent respectfully submits that Charge 12, which avers that Respondent commingled his legal fees with that of his client should be dismissed in its entirety, or alternatively, remanded for findings consistent with the proof presented. More specifically, there was no evidentiary proof submitted by Petitioner to establish that the cash received by Respondent, Shirley Gray, on June 28, 1996, for which she was credited with payment for legal fees, were the same funds deposited into Respondent's IOLA account to pay a bill for Ms. Gray. In fact, it would be inconsistent with the Respondent's business interests for the Respondent to credit Mr. Gray with a payment for a legal fee that same day and to then utilize those funds to pay a bill on her behalf without showing a corresponding charge for same in the invoice for services rendered as set forth in Exhibit 19.

VARGAS MATTER

Respondent respectfully submits that the J.H.O. committed prejudicial error by not granting a continuance of the hearing to allow Mrs. Vargas to testify on Respondent's behalf. Respondent's counsel avers that in the event that Mrs. Vargas were able to testify, she would have been able to confirm that she had granted Respondent permission to withdraw the funds he was holding in escrow on her behalf after consulting with her husband, who was appearing pro se during said period. Said testimony would have effectively refuted Charges 13, 16 and 17, which were sustained by the court.

CHARGE 13

With respect to Charge 13, wherein Petitioner alleges, inter alia, that Respondent misappropriated client funds by disbursing check #182 to "cash" for $1,500.00 prior to the corresponding deposit for $3,500.00 clearing the account, Respondent respectfully submits that as testified to during the deposition of July 15, 1997, that the acts of disbursing the check prior to the corresponding deposit clearing was not intentional, but was done only after being advised by the banking personnel at Citibank that the corresponding deposit had cleared the account. Moreover, it is common knowledge that most banks will not cash a check without the corresponding funds being on deposit. In this instance, the banking institution not only advised Respondent that the corresponding deposit had cleared the bank, but cashed the check presented to it by Respondent simultaneously thereto. No credence was given to Respondent's testimony in regards to this matter by the J.H.O..

CHARGE 24

With regards to Charge 24, wherein, Respondent is charged with failing to disburse $100.00 on behalf of Mrs. Vargas, it should be noted that Respondent considered those funds personal to him which had been earned in servicing Mrs. Vargas and she has indeed, been credited for said payment. It was also Respondent's understanding that pursuant to the Disciplinary Rules, he may keep a nominal amount of personal funds in the IOLA account to cover any incidental expenses. Thus, he allowed the $100.00 to remain in the account until the account was eventually closed.

Respondent testified at trial (see Trial Transcript, page 190) that he was not holding any funds on behalf of anyone at all. In fact, the Citibank IOLA account had been closed, as well as the Chase Trust Account. Prior written notice was given to Respondent's prior counsel, Brennan, Fabriani & Novenstern, of Respondent's intention to close the account. Written confirmation was also forwarded to counsel prior to the hearing to confirm that said accounts had been closed and all funds relating to any clients had been disbursed. Based upon information and belief, said letters were not submitted at the trial to Respondent's detriment. Moreover, for reasons discussed below, the principles of justice and equity dictate that Charge 24 should not be sustained against Respondent, for failing to disburse $100.00 to a client, when that client owes him in excess of $21,000.00.

CHARGE 25

As attested to in his correspondence to Petitioner and depositions conducted, Respondent respectfully submits that the only funds on deposit during the period that is the subject of the Charges set forth in Charge 25, was his fee which was recently earned, but not yet disbursed, in connection with servicing the Hooper Matter. There were no other funds on deposit for any client. Thus, Respondent respectfully submits that there was no "commingling" on the date check #139 for $350.00 was tendered on behalf of the Hooper Matter.

Based upon the foregoing, it is respectfully requested that Charge 25 be dismissed, alternatively, the imposition of the sanction imposed for said violation be tempered.

Appendix

ADDITIONAL MITIGATING FACTORS IN VARGAS

It should be noted that Petitioner exercised considerable care, skill and talent in portraying Respondent as someone who had taken advantage of Mrs. Vargas by either converting or misappropriating funds being held by Respondent on her behalf. Said portrayal, which is the subject of Charges 13, 16, 17, 19 & 24 which were sustained by the court, is far from the truth and fails to give a true account of the facts and circumstances. To place the Vargas matter in its proper context, judicial notice should be taken of the fact that Respondent has provided legal services to Mrs. Vargas in excess of $26,000.00. Respondent is still due and owed more than $21,000.00 by Mrs. Vargas despite Mrs. Vargas having received a check in the amount of $22,500 for equitable distribution in connection with the matrimonial action handled by Respondent on her behalf. Moreover, Respondent has obtained a fee arbitration award from the Westchester County Fee Arbitration Committee in the amount of $16,355.61 and a Judgment from the Hon. Anthony Scarpino "Setting and Fixing a Lien" in the amount of $16,355.61 against any of the proceeds derived from the action. A judgment in the amount of $5,000.00 against Mr. Vargas was awarded to Respondent by the Justice Scarpino. Mr. Vargas has yet to satisfy said judgment which was issued in 1996, despite due demand.

Respondent respectfully requests that the court consider that Respondent undertook the task of representing a client who initially did to have the funds to retain counsel, but availed herself of the services of the Respondent with the promise to compensate him upon the eventual distribution

of her equitable share in the marital estate. Upon receiving said services, without objection, as well as the proceeds from said efforts, Mrs. Vargas refused to tender payment to Respondent. Yet Respondent is now charged with misappropriating and converting funds being held on her behalf. It is respectfully submitted that said result is inequitable and unjust.

In mitigation, Respondent respectfully requests that the court take into consideration the unsolicited testimony of Amelia Del Vecchio, Law Assistant to Justice Louis Barone, the judge hearing the Vargas matter during the period in question. On page 99, line 6 of the Trial Transcript, Ms. Del Vecchio testifies:

Mr. Maloney, I have known him on other cases, he is a fine gentleman. When we conferenced other cases and we said this was what was going to be done, that was the understanding and I took his word because of knowing he is a good man, then he is going to follow through."

Justice Barone, the Presiding Justice relating to the Vargas matter has also submitted an Affirmation on Respondent's behalf attesting to Respondent's good character. A copy of said Affirmation, which was previously submitted, is annexed hereto as Exhibit "C".

Based upon the foregoing, it is respectfully requested that the matter be remanded for further findings, or alternatively the imposition of the sanction for the charges sustained referenced above, be tempered.

Appendix

CASH DISBURSEMENTS

CHARGES 26, 27, 28, 30, 31, 32 & 34

Respondent respectfully submits that there is no clearer demonstration that Respondent was not aware as to how to properly manage and handle an attorney IOLA, than as evidenced by the circumstances giving rise the charges set forth in Charges 26, 27, 28, 29, 30, 31, 32 & 34. More specifically, Respondent disbursed several checks to several entities to cover expenses relating to the servicing of several clients. With the exception of the checks referenced in Charge 31 and the residual charges relating thereto, Respondent disbursed the checks which are the subject of the aforesaid charges, against fees which he had earned that were being held in escrow, but not yet disbursed. Respondent was not aware at the time of these disbursements that said actions were prohibited. While the J.H.O. hearing this matter acknowledged the testimony of Respondent regarding this practice, said testimony was not given any credence.

Respondent respectfully submits that given the Respondent's limited understanding of the proper utilization of the escrow account by the Respondent during the period of the infractions which are the subject of the aforesaid charges, lack of harm to any client, the fact that no one complained of the Respondent, Respondent's full cooperation with the Petitioner's investigation which lasted more than four (4) years, that the court's sanction imposed for these violations be tempered.

Appendix

CHARGES 36, 37, 38, 45, 46, 48, 49, 51, 52, 53, 54, 56, 58 & 59

Respondent respectfully submits that he acted improperly in disbursing the funds that are the subject of Charges 36, 37, 38, 45, 46, 48, 49, 51, 52, 53, 54, 56, 58 & 59, but asks the court to temper its imposition of sanctions based upon the fact that no client was prejudiced by his actions, no one complained of his actions, any funds improperly removed were immediately reinstated to the account, his full cooperation and candor with the Petitioner's investigation which lasted nearly five (5) years, lack of venality as confirmed by the J.H.O. hearing the matter and the unlikelihood that any such violations would occur in the future. Moreover, given Respondent's 4 year record of public service as an employee of the court system, having clerked for the Hon. Harvey Sklaver, who testified on his behalf, his service as a staff member for the First Departmental Disciplinary Committee, wherein his training and scope of employment was limited to non-escrow related matters and his exemplary service to the community and the bar, which are set forth at length in the original moving papers present to the court herein, it is clear that Respondent has been a substantive asset to the bar and the community.

CHARGE 41

Upon a review of all the relevant records submitted by Petitioner as exhibits at the trial, it has become apparent to Respondent that the monies remaining in the Citibank IOLA account that is the subject of Charge 41, were not that of Ms. Lilly Brown, as alleged and admitted to in the charge,

but were personal funds that Respondent had earned, but not yet disbursed, in connection with the Vargas matter. Thus, Respondent respectfully submits that the funds disbursed in check # 197 in the amount of $30.00, belonged to Respondent, and not Ms. Brown and as such, said Charge should be dismissed or remanded for further findings consistent with the proofs submitted.

CHARGE 42

Respondent respectfully submits that $600.00 deposited into the Citibank IOLA account for the benefit of his sister's closing was a mere accommodation to assist her with the closing, and that he was not aware that said act constituted "commingling", particularly since no other client funds were on deposit when said deposit was made. Based upon the foregoing, it is respectfully requested that Charge 42 be dismissed, or alternatively, the severity of the court's imposition of sanctions for this violation be tempered.

CHARGES 44, 53 & 62

In Charges 44, 53 & 62, Respondent is charged with disbursing, respectively, $3.00, $68.43 and $.90 more than what he had on deposit for the clients who received the benefit of the payments. Respondent respectfully submits that said overpayments were mistakes and de minimis in nature. In fact, the only person harmed by these overpayments was Respondent, whose personal funds which were left in the account to cover any incidental expenses relating to the operation of the account, were depleted without restitution by the respective clients.

Based upon the foregoing, coupled with Respondent's full cooperation with the Petitioner's investigation which lasted more than four (4) years, it is respectfully requested that the court temper the imposition of sanctions against Respondent for the aforesaid infractions.

CHARGE 57

In charge 57 Respondent is charged with failing to disburse $597.00 for the benefit of the Breuss-Burgess. In his answer, Respondent avers that his client, Geiunevere Jones-Wood, actually owed him legal fees in excess of $597.00 and indicated at trial that at that time he was owed additional legal fees by Respondent, which was credited to her account resulting from a prior disbursement that is the subject of another charge. In fact, $103.00 is stilled owed to Respondent by Mrs. Wood for legal fees. There was no evidence presented at trial to contradict this testimony. Nonetheless, said charge was sustained by the J.H.O. Based upon the foregoing, it is respectfully requested that this charge be dismissed or alternatively, remanded for further findings. In the event that this Honorable Court is inclined to affirm the charge, it is respectfully requested that the court temper its imposition of the sanction imposed for this violation and note that Mrs. Jones-Wood has submitted a character affidavit on Respondent's behalf and has as recently as 6 months ago, utilized Respondent's services to conduct another closing wherein she was the seller.

CHARGE 58 & 59

Charge 58 & 59 which were sustained by the court, avers that Respondent withdrew funds for legal fees for which he was holding in escrow pursuant to a retainer agreement drafted by his office, prior to billing the client. Respondent respectfully requests that the court tempers it's sanctions for this infraction based upon several factors, including the fact that there was no ethical obligation by Respondent to place said funds in escrow, Respondent's uncontroverted testimony that the retainer agreement was fatally flawed, no harm was done to the client, and Respondent fully cooperated with the Petitioner's investigation regarding this matter. In fact the client has submitted an Affidavit on Respondent's behalf, a copy of which is annexed hereto as Exhibit "D".

Upon a review of the Respondent's financial records, it should be noted that no funds were misappropriated in connection with the Oliver matter that was never earned. Moreover, Oliver currently has an outstanding balance due and owing to the Respondent in excess of $10,000.00 for services rendered.

CHARGE 63

Charge 63, has been sustained against Respondent in part for conduct that adversely reflects on his fitness as a lawyer resulting from Respondent's alleged failure to disburse $12.67 on behalf of Mrs. Batson. Respondent respectfully submits that said amount was disbursed for the benefit of Ms. Batson prior to the hearing date in partial payment for the fees due and owing to Respondent. No evidence was

offered at trial to contradict this testimony, as well as documentation presented to trial counsel. Thus, it is respectfully requested that the J.H.O. committed prejudicial error in sustaining said charge which the court herein, hereafter relied upon in sustaining said charge.

CHARGE 64

Respondent respectfully submits that Charge 64, which emanates from Respondent's failure to deposit $475.00 partial retainer for a real estate transaction into his trust account regarding Mrs. Batson is narrowly drawn in that the factual allegations are true, but did not necessarily result in misappropriation of any client funds. The reality is more than four hours worth of services were rendered to Mrs. Batson in drafting a Sales Contact as well as conferring with several parties involved in the sale, prior to her presenting the partial retainer. In effect, the fee had been earned prior to it being presented. Moreover, there was no obligation to place said funds in escrow and there was no evidence presented to trial to controvert said testimony. Thus, it is respectfully requested that this charge be dismissed, alternatively, remanded for further findings consistent with the facts.

CHARGE 65, 66 & 67

Charges 65,66 & 67, again, are another clear demonstration of Respondent's misunderstanding of the proper use of an escrow account. In Charges 65 and 66 Respondent deposited earned fees, respectively, in the amount of $1,000.00, relating to the Miller Closing and $350.00, relating to the Thomas matrimonial action into his trust

account. The only funds on deposit during the time of the said deposit was $14.18 representing a portion of previously earned fee that was not disbursed, but kept in the account to cover any incidental expenses. Respondent subsequently disbursed several checks, as set forth in Charge 67 to cover the cost of handling several miscellaneous matters based upon the premise that all monies contained in the account were fees earned. There was neither any venality present, nor was any client harmed as a result of said acts. The account was closed shortly thereafter. Again while ignorance of the law is no excuse, the Respondent respectfully request that this court give credence to Respondent's testimony that he did not know said practice was improper and request that it temper its imposition of sanction for said infraction accordingly.

CHARGE 72

Petitioner contends that Respondent failed to disburse $25.00 relating to the Smith Closing despite Respondent presenting Petitioner with entire closing file that documents that the seller's were required to refund $225.00 from said closing. It should be noted that subsequent to the closing the Respondent realized that there was an overpayment to seller, thus he reduced the disbursement of his fee from $750.00 to $500.00 so that the account would not be overdrawn. He allowed the $25.00 fee, which he had earned, to remain in the account to cover any incidental expenses or errors resulting from any faulty accounting. He eventually received a refund for the $225.00 overpayment. It is respectfully submitted that it appears contrary to the principles of justice and equity to now charge him with acting improperly under

the circumstances. Given these factors, it is respectfully requested that the court temper its imposition of sanction relating to the matter herein.

IMPOSITION OF SANCTIONS

When determining the appropriate sanction to be imposed against a Respondent for escrow account violations, historically, there are a number of different factors that the court examines, including, but not limited to: venality, cooperation with the Petitioner's investigation, contrition, remorse, harm to client, seriousness of violation, prior history, likelihood of infraction recurring, character letters, circumstances impacting upon the Respondent's actions. The precedent in this Judicial Department indicate that the court has a history, as well as the discretion to impose sanctions ranging from public censure to disbarment in the most serious cases (See *In the Matter of Robert G. Whiteman*, 651 N.Y.S.2d 555, 226 A.D.2d 20 (1996) holding that Respondent attorneys, who converted funds entrusted to them on behalf of a client, failed to maintain required records for their attorney IOLA account and failed to properly file retainer closing statements with the Office of Court Administration, are guilty of professional misconduct, and, in consideration of the evidence offered in mitigation, they are censured; *In the Matter of Kenneth Popper*, 709 N.Y.S.2d 579, 274 A.D.2d 28 (2000), holding respondent's mishandling of escrow account warranted censure, in light of attorney's candor and cooperation, his expressed remorse, total lack of venality of his mistake, his immediate action in covering shortfall in his escrow account, absence of any prior disciplinary history, unlikelihood that such conduct would

ever be repeated and substantial other evidence offered in mitigation. *In the Matter of Robert J. Ponzini, and Robert W. Spencer, (citation to be provided)* holding that disbarment was "excessive discipline" because of the absence of any monetary loss to clients for letting escrow accounts fall to below zero, and because both attorneys reported the thefts of a former partner. The sanction imposed was a one year suspension; *In the Matter of Wynne*, 260 A.D.2d 23, holding respondent attorney who failed to properly maintain his escrow account, improperly converted funds entrusted to him as a fiduciary, is guilty of professional misconduct. Upon consideration of factors in mitigation, including Respondent's remorse and lack of venality, his previously unblemished record, his cooperation with the Grievance Committee's investigation, and character letters submitted on his behalf, respondent was suspended for a period of two years; *In the Matter of William Geier*, 709 N.Y.S.2d 195, 274 A.D.2d 103 (2000), holding attorney who converted escrow funds to the detriment of his client was disbarred.

In this particular instance, despite the numerous charges brought against the Respondent, there has been no finding of venality, Respondent has fully cooperated with the Petitioner's investigation that has lasted more than four (4) years, Respondent has expressed considerable remorse and contrition for his actions, no client has complained of Respondent, no client has been harmed or prejudiced in any manner, Respondent's clearly had a lack of understanding on the proper use of an escrow account, Respondent's lack of experience in handling escrow funds at the time of most of the infractions and the numerous Affirmations and Character letters from distinguished members of the bar,

community and various clients whose funds were the subject of the instant action. Respondent has also rendered exceptional service to the bar and community, as documented in his previous submissions. Said activities include, but are not limited to, serving as delegate to the Judicial Screening Panel for the Metropolitan Black Bar Association ("MBBA") and the Association of the Bar of the City of New York, (1990-1991 & 1998), President of the MBBA (1993-1994), Delegate to the Network of Bar Leaders (1993-1994), Vice Chairman of the Board of Directors of the MBBA (1994-1996), Vice Chairman of the Advisory Board of Directors for the New York Urban League (1994-1996), Chairman of the Board of the Advisory Board of the New York Urban League (1996-1998), member of the Board of Trustees for the New York County Lawyers Association (1997-2000). Respondent has also served as a volunteer and mentor to several organizations, including, but not limited to "The Door" a non-profit organization providing services and housing to drug addicts and prostitutes, Practicing Attorneys and Law Students (P.A.L.S.), Harlem Dowling Westside Center for Children, Association of the Bar of the City of New York's Haitian Asylum Project. He has been also an active contributing member to several standing committees in the Association of the Bar (Council on International Affairs, Women in the Courts, Federal Task Force on Race and Gender in the courts, minority job recruitment conference co-founder, Lawyers In Transition, etc.) New York County Lawyers Association, as well as the MBBA. Given his short tenure as a member of the bar, it is clear that Respondent's commitment and contributions to the bar and the community exceeds a majority of his peers.

Appendix

In mitigation, Respondent submits several supplemental letters and Affirmations of Support in connection with the instant application, including a letter from his Pastors, Pastors Clinton and Sarah Utterbach, a letter from Diane Pollard, Esq., an attorney on Staff with the New York City Police Department, as well as an Affirmation from Arlene Gordon Oliver, Esq., a partner in a prominent Westchester County firm, as well as the current President of the Westchester County Black Bar Association. Said exhibits are annexed hereto respectively as Exhibits "E, F, & G," respectively.

It is the Respondent's hope that with the additional explanation of the circumstances that gave rise to the charges sustained, and a more careful review of the facts and proofs offered at trial, that the court will see that the matter is more analogous to the cases cited above wherein the less severe sanction of disbarment was not granted, but the suspension ranged anywhere from public censure to a two year suspension.

WHEREFORE, Respondent prays that the court temper its imposition of the strong sanction of disbarment for the infractions committed, plus other, and further relief as this Honorable Court may deem appropriate and just.

Dated: White Plains, New York
May 16, 2001

s/ Andrew G. Maloney
ANDREW G. MALONEY

AFFIDAVIT OF GUILLERMO BROWN IN OPPOSITION TO MOTION TO SUSPEND ON AN INTERIM BASIS

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of ANDREW G. MALONEY, an Attorney and Counselor-at-Law

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

ANDREW G. MALONEY,

Respondent.

(Admitted under the name Andrew Gerald Eardley Maloney)

AFFIDAVIT OF GUILLERMO BROWN IN OPPOSITION TO MOTION TO SUSPEND ON AN INTERIM BASIS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, GUILLERMO BROWN, being duly sworn, hereby state under the penalties of perjury:

1. It has been brought to my attention that there has been a complaint brought against Mr. Andrew G. Maloney

emanating, in part, from a loan transaction between Mr. Maloney and myself and I hereby make this Affidavit in Opposition to said Motion and in support of Mr. Maloney being allowed to continue to practice law.

2. It should be noted that with respect to the loan transaction between Mr. Maloney and myself, I agreed to same and was aware that he would be drawing against said funds held in escrow on my behalf. Said funds have been repaid in full as per our agreement.

3. I have no complaints regarding the manner in which Mr. Maloney provided legal services to me and he has in fact provided legal counseling to me, as well as several of my clients on a pro bono basis over the past several years. Moreover, I would not hesitate to refer clients to him which I have attempted to do on several occasions since.

4. It is my firm opinion that Mr. Maloney has the necessary qualities to continue to represent clients in a fair and objective manner and has demonstrated an unparalelled commitment regarding servicing the needs of his clients.

Dated: New York, New York
November 29, 1999

s/ Guillermo Brown
GUILLERMO BROWN

AFFIRMATION OF WILLIAM MCMULLAN

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of ANDREW G. MALONEY, an Attorney and Counselor-at-Law

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

ANDREW G. MALONEY,

Respondent.

(Admitted under the name Andrew Gerald Eardley Maloney)

AFFIRMATION OF WILLIAM MCMULLAN

I, WILLIAM MCMULLAN, an attorney duly licensed to practice law in the State of New York hereby affirm the following under the penalties of perjury:

1. I am one of the principal attorneys in the law firm of Danow, McMullan & Panoff with offices located at 271 Madison Avenue, New York, New York 10016.

2. In or about the latter part of June 1996, I received a check from Mr. Maloney's office in the amount of One Thousand, Five Hundred ($1,500.00) Dollars drawn upon his escrow account. In light of the fact that the check did not have any written instructions regarding same, upon receipt of said check, the check was presented for payment.

3. On the date that said check was presented to Mr. Maloney's bank, I received a call from Mr. Maloney who advised me that he had been tied up in court and did not have the opportunity to make the deposit to cover the check, but would be doing so later on that date. Mr. Maloney advised me that in the event that the check bounces that it should be redeposited.

4. The check was indeed returned for insufficient funds and redeposited wherein it cleared several days later.

5. Based upon information and belief, Mr. Maloney also compensated my office for any return check fees incurred by my office.

6. It has been brought to my attention that there has been a complaint brought against Mr. Andrew G. Maloney as a result of the afore-referenced transaction.

7. Based upon my interaction with Mr. Maloney during the course of the aforesaid transaction and several other transactions that occurred during the same time period in issue, Mr. Maloney has been always candid and forthright regarding the disposition of any funds tendered to my office on behalf of his client and I do not believe Mr. Maloney intended to defraud my office in any way be issuing an invalid check.

Dated: New York, New York
November 29, 1999

s/ William McMullan
WILLIAM MCMULLAN

AFFIRMATION OF HON. LOUIS A. BARONE

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of ANDREW G. MALONEY, an Attorney and Counselor-at-Law

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

ANDREW G. MALONEY,

Respondent.

(Admitted under the name Andrew Gerald Eardley Maloney)

AFFIRMATION OF HON. LOUIS A. BARONE

I, LOUIS A. BARONE, a member of the Judiciary of the State of New York, hereby affirm under the penalties of perjury:

1. I am currently employed by the New York State Judiciary as a Justice of the Supreme Court of the State of New York.

2. I am aware of the general nature of the charges pending against Respondent, Andrew G. Maloney and I am hereby submitting this Affirmation on behalf of Mr. Maloney in connection with the above-referenced attorney disciplinary matter.

3. I have known Mr. Maloney for approximately five (5) years as a result of his having appeared before me on numerous occasions in connection with several matrimonial actions where he represented various litigants. I have also had the opportunity to discuss Mr. Maloney's character and reputation with several members of the bar.

4. As a result of the foregoing activities, I am familiar with Mr. Maloney's reputation in the community. His reputation for honesty and integrity is of the highest caliber.

Dated: New York, New York
July 12, 2000

s/ Louis A. Barone
HON. LOUIS A. BARONE

AFFIDAVIT OF EDWARD OLIVER

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of ANDREW G. MALONEY, an Attorney and Counselor-at-Law

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

ANDREW G. MALONEY,

Respondent.

(Admitted under the name Andrew Gerald Eardley Maloney)

AFFIDAVIT OF EDWARD OLIVER

I, EDWARD OLIVER, being duly sworn, hereby state the following under the penalties of perjury:

1. I am a retired Operating Engineer for the Town of Islip, New York, where I was employed for more than twenty five (25) years prior to retiring in 1989.

2. Over the past several years, I have been entrusted with caring for my spouse who suffered a stroke as a result of several work related incidents. Upon being dissatisfied with my current attorney handling her disability claim, I inquired amongst several of my colleagues for a reputable attorney. As a result of said search, I was referred to Andrew G. Maloney, Esq.

3. Upon meeting with Mr. Maloney, in August 1997, Mr. Maloney agreed to handle my case and apprised me as to what steps were involved in handling the case. He requested an initial retainer in the amount of Ten Thousand ($10,000.00) Dollars which I tendered during said period.

4. During said period, Mr. Maloney provided me with a retainer agreement which I executed and submitted to his office. Upon meeting with him he explained the billing procedures to me. In response to his explanations, I indicated to him that I was not concerned with the billing procedures and that he should do whatever he needed to do to handle the case, including, advancing any monies to cover fees, costs and expenses. I indicated to him that my primary concern was to remedy the denial of disability benefits requested by my wife for her job related injuries.

5. Mr. Maloney has done a tremendous job in servicing me as a client for which I am grateful. Moreover, he has lived up to his reputation in the community for being an attorney who trustworthy and full of character. As a result, I would not hesitate to refer any of my friends and family members to him.

6. It should be noted that I am not available to testify on Mr. Maloney's behalf as a result of having to care for my wife who has recently suffered another stroke. But anyone needing any additional information about Mr. Maloney should feel free to contact by telephone.

Dated: March ___, 2000

s/ Edward Oliver
EDWARD OLIVER

LETTER FOR REQUEST FOR RECONSIDERATION OF SANCTION IMPOSED DATED MAY 15, 2001

Clinton H. Utterbach
Sarah W. Utterbach
Pastors

REDEEMING LOVE
CHRISTIAN CENTER

May 15, 2001

Presiding Justice Lawrence J. Bracken
Supreme Court of the State of New York
Appellate Division, Second Department
45 Monroe Place
Brooklyn, NY 11201

Re: In the Matter of Andrew G. Maloney — Request for Reconsideration of Sanction Imposed

Dear Justice Bracken:

It is with great joy that we present to you this letter attesting to the character of Mr. Andrew G. Maloney, a member of our congregation for more than ten (10) years. Mr. Maloney, throughout his years in attendance at our church, has been a diligent and steadfast member who has demonstrated, consistently through his lifestyle and behavior, that he knows and understands the principles and truths set forth in the Holy Bible. Mr. Maloney is highly regarded by other members of the congregation and has often been called upon to render legal advice to several members of the congregation, which he has provided at little or no charge. He is regarded as

someone that may be trusted and honest in rendering legal services. He has volunteered on numerous occasions in assisting in the various aspects of the ministry, including but not limited to, serving as a chaperone on a trip for our Youth Ministry to Baltimore, Maryland. We have also come to know Mr. Maloney's wife and children, respectively, Dr. Romelle J. Maloney, Megan and Andrew Maloney, Jr. Both of Mr. Maloney's children attended Love Christian Academy, a school which was known for its high standards for academic excellence, over a 2 to 4 year period prior to its closing. Their attendance at the school also gave us an opportunity to further interact with Mr. Maloney. Judging from the reverence to the word of God that has been instilled into his children, it is clear that Mr. Maloney, as the head of his household, is someone that keeps God's principles close to his heart.

It is our understanding that Mr. Maloney's license to practice law has been effectively revoked as a result of several improprieties relating to his management of his attorney escrow account dating as far back as 1994. It is also our understanding that no one has been harmed by any of these actions and that there has been no finding of marked dishonesty. Moreover, we further understand that there have been no complaints of any wrongdoing against Mr. Maloney. Given what we know of Mr. Maloney's character and reverence of the Lord, we are confident that any lapse in judgment by Mr. Maloney in committing these acts were not normal in nature and it is highly unlikely to occur in the future.

To place our opinion of Mr. Maloney in its proper context, it should be noted that there are over two thousand (2,000) members in our congregation, and we have a staff of more

than three hundred fifty (350) people, many of whom are volunteers. We also have a radio ministry that is broadcast on thirty-four (34) stations around the world. We frequently fellowship with and counsel many ministers that are world renown. We have been recipients of many awards for our teaching and music ministry, which are also heard around the world. Thus, we are often called upon to by many to provide counseling during their critical hour of need, but do so only under the compulsion and direction of the Holy Spirit.

There is no doubt in our minds that Mr. Maloney is a Christian according to the Bible's standards. He has asked forgiveness of God, his pastors and his family for any wrongdoing, intentional or otherwise, which we believe has been granted by all of us.

A personal observation is that Mr. Maloney single handedly prepares and accompanies his children to church even when Dr. Maloney, his wife and a physician, is on call. This has taken place for as long as the children have been born. As pastors of a large integrated congregation, we are not often aware of this kind of commitment to God, family and church. We have few fathers at home or even supporting their families; please don't allow Mr. Maloney to become another statistic in the vicious cycle we so often see.

It is our hope that you will reconsider the severity of the sanction imposed upon Mr. Maloney and provide him with the opportunity to practice law again. Once provided with the opportunity to resume the practice of law, we are confident that you will find Mr. Maloney to be a faithful and diligent servant, committed to the ways of the Lord in rendering services to the public.

Wishing you God's peace and blessings in your deliberation, we remain,

His joint heirs,

s/ Clinton and Sarah Utterbach
Clinton and Sarah Utterbach
Pastors

LETTER FOR REQUEST FOR RECONSIDERATION OF SANCTION IMPOSED DATED MAY 5, 2001

DIANE POLLARD, ESQ.
67 Wall Street, Suite 2211
New York, N.Y. 10005
(212) 804-5723

May 5, 2001

Presiding Justice Lawrence J. Bracken
Supreme Court of the State of New York
Appellate Division, Second Department
45 Monroe Place
Brooklyn, NY 11201

Re: In the Matter of Andrew G. Maloney — Request for Reconsideration of Sanction Imposed

Dear Justice Bracken:

I take this opportunity to comment on the character of Andrew G. Maloney in support of Mr. Maloney's Request for Reconsideration of the Sanctions relating to your recently published decision.

I have been a New York City Police Detective for nearly twenty (20) years, fifteen of which, have been within the legal field. I was assigned as a Prosecuting Attorney in the Department's Advocate's Office and I currently serve as a Deputy Managing Attorney within the Legal Bureau. Throughout my twenty (20) years with the NYPD, I have gained a vast amount of experience with law enforcement

officers and civilians. As a result of my extensive experience within law enforcement, I believe I have become an excellent judge of character.

I have known Mr. Maloney for approximately five (5) years through my involvement in several bar associations, court related, as well as social functions. I have observed him to be a conscientious, caring, talented and responsible young man who has the utmost respect for his family and people in general. I have always admired his family values and the manner in which he and his wife are raising their two young children. I am 100% confident in Mr. Maloney's abilities and professionalism as an attorney and I am sure that he will continue to be the steadfast responsible person that has inspired him to work so hard to become an attorney, once provided with the opportunity to continue to practice law.

Based upon my observation, Mr. Maloney has the utmost respect for the legal profession. He is an exceptionally able and committed lawyer who has devoted his professional life to the legal system. Unfortunately, in life, we all make mistakes and errors in judgment. Thus, I view the charges that have been sustained against Mr. Maloney to be aberrational in nature, particularly in light of Mr. Maloney's deeply rooted respect for legality and his obedience to the law, which I consider to be one of his greatest virtues. In fact, many attorneys, both young and old, admire and look up to Mr. Maloney, as he has been a positive influence and inspiration to them. Moreover, through his hard work, leadership and voluntary contributions to several bar and civic organizations, it is clear that Mr. Maloney is someone that many people hold in high esteem.

Appendix

The legal community truly has been blessed to have had the services of someone with the level of commitment to the profession as Mr. Maloney. It will truly be a loss to the profession and to the community to sustain the current sanction of disbarment against Mr. Maloney. Thus, I pray that you will give favorable consideration to Mr. Maloney's request for Reconsideration of Sanctions and truly assess Mr. Maloney's character and fitness to practice law based upon his work, dedication and commitment to the legal community, bar and the community at large.

Again, thank you for your favorable consideration of Mr. Maloney's request for Reconsideration. I remain,

Respectfully yours,

s/ Diane Pollard
Diane Pollard, Esq.

AFFIDAVIT OF ARLENE GORDON OLIVER, ESQ.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of ANDREW G. MALONEY, an Attorney and Counselor-at-Law

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

ANDREW G. MALONEY,

Respondent.

(Admitted under the name Andrew Gerald Eardley Maloney)

TO: HON. LAWRENCE J. BRACKEN,
PRESIDING JUSTICE
HON. CORNELIUS J. O'BRIEN
HON. FRED T. SANTUCCI
HON. MYRIAM J. ALTMAN
HON. GABRIEL M. KRAUSMAN

AFFIRMATION OF ARLENE GORDON OLIVER, ESQ.

I, ARLENE GORDON OLIVER, ESQ., an attorney duly admitted to practice law in the State of New York hereby affirms under the penalties of perjury:

1. I am presently employed as a partner with the Law Firm of Rattett & Pasternak LLP. I am also active in several bar associations in Westchester County,

New York, including, but not limited to serving as the current President of the Westchester County Black Bar Association. I hereby submit this Affirmation in support of Mr. Maloney's Motion for Reconsideration of the level of sanction imposed against him.

2. I have known the Respondent, Andrew G. Maloney, Esq., for more than two (2) years as a result of our mutual involvement in a pending bankruptcy and surrogate court proceedings and as a member of various bar associations. During my professional association with Mr. Maloney, in the context of the litigation of the bankruptcy and surrogate court proceeding, it is clear that Mr. Maloney has represented the interests of his client in a competent and professional manner, thereby earning the respect of the court and various attorneys associated with the case. I have also become acquainted with Mr. Maloney as a result of working with Mr. Maloney in planning and organizing several bar association programs. His experience in planning and executing various programs for the bar and community has been a tremendous source of reference in establishing and executing the agenda of the organization that I am currently leading. I have also become acquainted with the various activities which Mr. Maloney has participated in the past which speaks loudly of his character and commitment to the community. Said organizations include, but not limited to, volunteering his services to the New York Urban League wherein he served as Vice-Chairman and Chairman of its Advisory Board over a four year period and was instrumental in raising several hundred thousand

dollars for the organization on an annual basis, as well as his service to the New York County Lawyers Association, wherein he sat on its Board of Directors from 1997-2000, and the Metropolitan Black Bar Association, wherein he served as President from 1993-1994.

3. Based upon the foregoing, I have had the opportunity to assess Mr. Maloney's skills and talent in the courtroom, as well as his commitment to the bar. I have also had the opportunity to assess Mr. Maloney's veracity and character in the community and I can state unequivocally that his reputation for honesty and integrity is held in the highest regards in the legal, as well as the community at large.

4. Indeed, many of my colleagues in the bar share in my opinion that Mr. Maloney's disbarment is truly a loss to the legal community and community at large from which he will be sorely missed.

5. Based upon the foregoing, it is my hope that the court will reconsider the level of sanction imposed upon Mr. Maloney for the violations committed and will take into consideration his strong level of commitment to service to the bar and the community in assessing his character and fitness to practice law.

Dated: Harrison, New York
May 11, 2000

s/ Arlene Gordon Oliver
ARLENE GORDON OLIVER, ESQ.

No. 01-1881

Supreme Court, U.S.
FILED
JUL 23 2002
CLERK

IN THE

Supreme Court of the United States

ANDREW G. MALONEY,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the State of New York Court of Appeals properly dismissed the attorney's motion to reargue on the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution of the State of New York?

2. Whether the State of New York Supreme Court, Appellate Division, which is empowered to oversee the practice of law in the state, after a full and fair hearing at which the attorney was represented by counsel of the attorney's choice, may disbar the attorney based upon the unique set of facts and circumstances in the case?

3. Whether the attorney's counsel's alleged failure to submit several documents during the disciplinary proceeding affected the Appellate Division's decision to disbar the attorney?

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PRELIMINARY STATEMENT

This brief is submitted in opposition to the application of Andrew G. Maloney, Petitioner herein, for a writ of certiorari. Petitioner disputes the decisions of the State of New York Supreme Court, Appellate Division, Second Judicial Department, which disbarred him from the practice of law and denied his motion to reargue, and the subsequent decisions of the State of New York Court of Appeals, which dismissed his various motions for leave to appeal the Appellate Division's disbarment order and its order denying reargument.

STATEMENT OF THE CASE

By order of the State of New York Supreme Court, Appellate Division, Second Judicial Department, dated and entered on December 27, 1999, the Grievance Committee for the Ninth Judicial District, Respondent herein, was authorized to institute and prosecute a disciplinary proceeding against Andrew G. Maloney, Petitioner herein. The issues raised by the disciplinary petition and any answer thereto were referred to a Special Referee, the Hon. Jerome M. Becker, a former judge of the State of New York Criminal and Family Courts, to hear and report, together with his findings on the issues. The order denied that branch of the Grievance Committee's motion seeking Mr. Maloney's immediate suspension from the practice of law pending the outcome of the disciplinary proceeding.

A petition containing 75 charges of professional misconduct was served upon Mr. Maloney. Charges 43, 71, 74 and 75 were withdrawn during the course of the disciplinary proceeding, based on newly received evidence.

Charges 7, 13, 14, 17, 18 and 20 through 23 were amended prior to the disciplinary hearing, also based on newly received evidence. Mr. Maloney admitted virtually all of the factual allegations contained in the charges but denied that he was guilty of professional misconduct.

During the course of the disciplinary proceeding (including at the disciplinary hearing) Mr. Maloney was represented by three successive counsel, all of whom are well respected and experienced in attorney disciplinary matters. At the disciplinary hearing, Mr. Maloney testified on his own behalf and called three character witnesses. He also submitted 12 character affidavits. After the hearing concluded, both parties submitted proposed findings to the Special Referee.

After consideration of both parties' proposed findings, the Special Referee issued a report sustaining all of the remaining 71 charges. The Grievance Committee moved to confirm the Report of the Special Referee. Mr. Maloney's counsel cross-moved to confirm the Report in part and disaffirm it in part, and the Grievance Committee submitted an affirmation in response, urging that Mr. Maloney's counsel's cross motion be rejected by the court as untimely. However, the court considered the cross motion despite its untimeliness, and referenced same in its subsequent decision.

After review of both parties' submissions, the Appellate Division, Second Department, sustained 53 of the remaining 71 charges, including charges that Mr. Maloney misappropriated client funds with which he was entrusted; entered into an improper business relationship with a client; breached his agreement to repay, upon request, an undocumented, interest-free loan from a client's escrow funds; made cash withdrawals from his escrow account; failed

to maintain and/or produce required bookkeeping records; commingled personal funds with client funds; disbursed escrow checks when he did not have funds on deposit to cover the checks and/or before the corresponding deposits cleared; transferred funds from one escrow account to another in order to cover a negative balance in the receiving account; and engaged in various other misconduct adversely reflecting on his fitness as a lawyer. The Appellate Division's order, dated April 16, 2001, states that in determining the appropriate measure of discipline to impose, it considered all the mitigation offered by Mr. Maloney. Nonetheless, the court determined that he was "guilty of serious professional misconduct that warrants his disbarment."

By motion dated May 16, 2001, Mr. Maloney sought leave to reargue the Appellate Division's decision disbarring him from the practice of law and, upon reargument, modification of the sanction imposed, as well as a stay of the sanction pending the Appellate Division's decision on his motion. The Grievance Committee submitted an affirmation in opposition to Mr. Maloney's motion to reargue, and a response to his reply.

By decision and order dated August 7, 2001, the Appellate Division, Second Department, denied Mr. Maloney's motion to reargue. On August 14, 2001, the Grievance Committee served said decision and order on Mr. Maloney by mail, with notice of entry.

On September 17, 2001, Mr. Maloney served the Grievance Committee with one copy of a Notice of Motion and Affidavit in Support of Motion for Leave to Appeal the Appellate Division's decision disbarring him, and that court's subsequent decision denying his motion to reargue, to the

State of New York Court of Appeals. The service was defective in that it was not timely. The Grievance Committee has no knowledge of when Mr. Maloney filed his motion with the State of New York Court of Appeals.

On October 23, 2001, the State of New York Court of Appeals issued a decision dismissing Mr. Maloney's motion for leave to appeal as untimely. On October 31, 2001, the Grievance Committee served Mr. Maloney with a copy of the court's decision.

On November 20, 2001, Mr. Maloney served the Grievance Committee with his Notice of Motion and Affidavit in Support of Motion for Leave to Reargue the Court of Appeals' October 23, 2001, decision. It should be noted that said motion requested leave to reargue only that branch of the decision dismissing Mr. Maloney's application to reargue the Decision and Order of the Appellate Division, Second Department, dated August 7, 2001, which denied Mr. Maloney's motion to reargue the disbarment order. Mr. Maloney's November 20, 2001, motion *did not seek to reargue the branch of the Court of Appeals' decision that dismissed his earlier motion to reargue the disbarment order*, which was dated April 16, 2001.

Consequently, the subsequent decision of the State of New York Court of Appeals, which was issued on January 15, 2002, dealt only with Mr. Maloney's "motion for reargument of so much of [his] prior motion as sought leave to appeal from an Appellate Division order denying reconsideration, which was dismissed as untimely by [the Court of Appeals] on October 23, 2001." The Court of Appeals granted the motion for reargument of the Appellate Division's order denying reconsideration of the disbarment

order and, upon reargument, dismissed that part of the motion for leave to appeal upon the ground that the order sought to be appealed from — *i.e.*, the motion to reargue the disbarment order — "does not finally determine the proceeding within the meaning of the Constitution." Thus, the earlier, October 23, 2001, decision of the Court of Appeals, which dismissed as untimely Mr. Maloney's motion for leave to appeal the underlying disbarment order, was left undisturbed. On January 18, 2002, the Grievance Committee served the Court of Appeals' January 15, 2002, decision on Mr. Maloney by mail, with notice of entry.

On February 15, 2002, Mr. Maloney served the Grievance Committee with his Notice of Motion and Affidavit in Support of Motion for Leave to Reargue the Court of Appeals' decision dated January 15, 2002. Said service was not timely, as it was required to be served by February 14, 2002. The motion was denied by decision of the Court of Appeals, dated March 26, 2002.

REASONS FOR DENYING THE WRIT

I.

THE STATE OF NEW YORK COURT OF APPEALS CORRECTLY HELD THAT THE ORDER ISSUED BY THE APPELLATE DIVISION, SECOND DEPARTMENT, DATED AUGUST 7, 2001, WHICH DENIED ANDREW MALONEY'S MOTION FOR LEAVE TO REARGUE THE COURT'S EARLIER ORDER DISBARRING HIM FROM THE PRACTICE OF LAW, IS NOT A FINAL ORDER WITHIN THE MEANING OF THE CONSTITUTION OF THE STATE OF NEW YORK.

In the motion before this Court, Andrew Maloney, Petitioner herein, argues that the State of New York Court of Appeals decision dated January 15, 2001, erred in holding that the Decision & Order issued by the Appellate Division, Second Department, dated August 7, 2001, which denied his motion for leave to reargue the Appellate Division's earlier Opinion & Order, dated April 16, 2001, disbarring him from the practice of law, "does not finally determine the proceeding within the meaning of the Constitution." His argument is fallacious.

As set forth in greater detail *supra* in the Grievance Committee's "Statement of the Case," Mr. Maloney never moved to reargue that branch of the Court of Appeals decision, dated October 23, 2001, which denied his prior motion for leave to reargue the Appellate Division's disbarment order. Rather, he moved to reargue only that branch of the decision that denied him leave to appeal from the Appellate Division's order denying reargument of its disbarment order.

As the Court of Appeals determined in its January 15, 2002 decision, the Appellate Division's Decision and Order, dated August 7, 2001, which denied Mr. Maloney's motion for leave to reargue the disbarment order, "does not finally determine the proceeding within the meaning of the Constitution." Rather, the underlying disbarment order finally determined the matter within the meaning of the Constitution, and Mr. Maloney never sought leave to reargue the disbarment order itself. Thus, Mr. Maloney failed to exhaust his procedural remedies in the courts below.

The definition of when an Appellate Division order is deemed final (and therefore is subject to review) is found in Section 5611 of the New York Civil Practice Law and Rules. Section 5611 states that an order shall be considered a final one only if it "disposes of all the issues in the action," and that "a subsequent appeal may be taken only from that [final] order **and not from any judgment or order entered pursuant to it**" [emphasis added]. In Mr. Maloney's case, the disbarment order was the Appellate Division's final order disposing of all the issues in the action, and the subsequent order denying leave to appeal was entered pursuant to the disbarment order. Thus, no appeal can lie from the denial of Mr. Maloney's motion for reargument of the disbarment order and, despite Mr. Maloney's far-fetched arguments to the contrary, the Court of Appeals correctly determined in its decision, dated January 15, 2002, that the order from which Mr. Maloney sought to appeal does not finally determine the proceeding within the meaning of the Constitution and, accordingly, was not subject to review.

II.

PETITIONER'S DISBARMENT FROM THE PRACTICE OF LAW IN THE STATE OF NEW YORK DID NOT VIOLATE HIS RIGHT TO EQUAL PROTECTION OF THE LAWS.

The sanction of disbarment imposed upon Andrew Maloney, Petitioner herein, by the State of New York Supreme Court, Appellate Division, Second Judicial Department, is not excessive or a violation of equal protection, as he claims. It is solely within the discretion of the Appellate Divisions of the State of New York Supreme Court to determine appropriate sanctions after reviewing each disciplinary matter individually and carefully weighing each unique set of facts and circumstances, being mindful that one of the clear purposes of such disciplinary sanctions is to preserve public confidence in the legal profession. *See Matter of Nulle*, 88 A.D.2d 657 (3d Dep't 1982); *Matter of Levy*, 261 A.D. 229 (1st Dep't 1941); *Matter of Flannery*, 212 N.Y. 610 (1914); New York State Judiciary Law § 90(4)(h).

The severity of the sanction imposed has been appropriately viewed as a question of fact, soundly within the discretion of the Appellate Divisions. *Cohen and Karger, Powers of the Court of Appeals*, § 108, pp. 452-453. Accordingly, the Appellate Division's decision in Petitioner's case should not be questioned unless it can be shown that the sanction imposed constitutes an abuse of discretion as a matter of law. *Cohen and Karger*, *supra* at § 459. Although Petitioner contends that such is the case herein, the State of New York Court of Appeals has rendered such a finding in an attorney disciplinary matter only where it found there was no evidence to sustain the charges of misconduct. *Matter of*

Clay, 282 N.Y. 140 (1940); *Matter of Mix*, 274 N.Y. 183 (1937); *Matter of Del Bello*, 28 A.D.2d 994 (2d Dep't 1967). Such clearly is **not** the case in Petitioner's matter.

Petitioner argues that the New York courts have been inconsistent in imposing disciplinary sanctions in cases of similar misconduct. In support of his argument, Petitioner cites several cases wherein the court censured attorneys, and several cases wherein the court imposed suspensions of varying length for misconduct that Petitioner apparently views as analogous in severity to his own. However, all the cases cited by Petitioner have widely varying fact patterns, both from each other and from the facts at issue in Petitioner's disciplinary proceeding. Rather than having the intended effect of demonstrating the unfairness of Petitioner's disbarment, a reading of the cited cases demonstrates that the Appellate Divisions, in the interests of fairness and justice, review each matter individually and carefully weigh each unique set of facts and circumstances before reaching a conclusion as to an appropriate sanction.

Each of the cases cited by Petitioner is distinguishable on the facts, including, for example, *Matter of Robert G. Whiteman and Stephen G. Gorray*, 226 A.D.2d 20 (2d Dep't 1996). In *Whiteman and Gorray*, the court sustained only six charges of professional misconduct, only one of which involved an escrow violation, as opposed to Petitioner's case, wherein the vast majority of the fifty-three charges sustained by the Appellate Division involved escrow violations. In deciding to censure the attorneys in *Whiteman and Gorray*, the court considered, among other mitigating factors, "the serious medical and personal problems besetting Gorray and his family" and that neither attorney had a prior disciplinary history. In contrast, Petitioner offered no medical

or personal problems to mitigate his proven misconduct, and he previously had been issued a letter of admonition for, *inter alia*, failing to use proper care to safeguard the interests of his client.

The facts in *Matter of Kenneth F. Popper*, 274 A.D.2d 28 (2d Dep't 2000) are also distinguishable from those at issue in Petitioner's case. In *Popper*, the court sustained only three charges of attorney misconduct, all of which related to one isolated incident in which the attorney mistakenly believed that he had received the total amount in settlement of a particular matter, which led him to disburse related funds prematurely. In contrast, the Appellate Division sustained fifty-three charges against Petitioner, relating to a pervasive pattern of professional misconduct over a period of years, including the serious charges that he repeatedly converted escrow funds. *Popper* is also distinguishable in terms of mitigating circumstances. The court found that Popper suffered from extreme emotional stress, which led the court to conclude that his attention to detail had been diminished, unlike Petitioner herein, who presumably was in full possession of his faculties at all times at issue. Popper also had an unblemished disciplinary history, unlike Petitioner herein. Accordingly, the court censured Popper "[i]n light of these **particular and unique circumstances**" [emphasis added].

In the *Matter of Robert J. Ponzini*, 268 A.D.2d 478 (2d Dep't 2000), the court sustained thirteen escrow-related charges stemming from the attorney's ex-partner's theft of escrow funds and imposed the sanction of disbarment. Upon reargument, the court found the disbarment was excessive discipline based upon "**the peculiar circumstances of this case**" [emphasis added] and substituted a one-year

suspension for the disbarment it had previously imposed. The circumstances in Petitioner's case are completely at variance with the circumstances in *Ponzini* — it is Petitioner herein, not his partner, who converted clients' escrow funds, among other misconduct.

In the *Matter of John H. Wynne*, 260 A.D.2d 23 (2d Dep't 1999), the court sustained five charges of misconduct, only one of which involved conversion of funds entrusted to the attorney as a fiduciary. As in the other cases cited by Petitioner, and unlike Petitioner's case, the attorney had a previously unblemished disciplinary record. Although the court's decision did not provide details, it stated, among other things, that the attorney had a "weakened physical and mental condition" and was under duress at the time.

In the *Matter of A. Richard Gambino*, 205 A.D.2d 212 (2d Dep't 1994), wherein the court suspended Gambino from the practice of law for one year, the facts are distinguishable from those in Petitioner's case. The charges involved "technical" violations of the disciplinary rules regarding escrow accounts, which did not threaten the integrity of the funds in the account. None of the seven charges sustained by the court involved the conversion of escrow funds, and Gambino had no significant disciplinary history.

In the *Matter of Mary Anne Scattaretico-Naber*, 250 A.D.2d 334 (2d Dep't 1998), the court censured the attorney after sustaining five charges of professional misconduct. Here, too, the facts are distinguishable from those in Petitioner's case. The charges against Scattaretico-Naber involved one isolated incident wherein she disbursed

more funds than she had on deposit for the benefit of a client, and she covered the overdraft with personal funds. She had no disciplinary history.

Petitioner argues that he was denied his right to equal protection of the law and should not have been disbarred because New York courts typically disbar attorneys only when they have committed escrow violations to the detriment of their clients. Petitioner cites *In the Matter of Salvatore DiMisa*, 218 A.D.2d 441 (2d Dep't 1996) in support of his argument. It is true that DiMisa failed to repay escrow funds to two clients, but he was disbarred because he "breached his fiduciary obligation to maintain escrow accounts intact," *id.* at 445, **not** because he failed to repay his clients. Petitioner also cites *In the Matter of Raymond G. Perez*, 223 A.D.2d 330 (2d Dep't 1996), but the attorney in *Perez* was disbarred "on default," *id.* at 331.

Petitioner's argument that he was denied his right to equal protection conveniently ignores the plethora of cases in which the Appellate Divisions imposed the sanction of disbarment for misconduct similar to, or arguably less egregious than, Petitioner's. *See, e.g., Matter of William P. Geier*, 274 A.D.2d 103 (2d Dep't 2000). In *Geier*, which Petitioner inexplicably cites as an example of misconduct *more* egregious than his own, the court disbarred the attorney although it sustained only a single charge against him — *i.e.*, that he converted $4,250 of a $29,500 down payment with which he had been entrusted for the benefit of his clients, the sellers of a home, by allowing the balance in his escrow account to fall below the amount he was required to be holding. Geier made full restitution to his clients, so they were not harmed by his conversion. In Petitioner's case, the court found that he made numerous conversions of clients'

escrow funds under fact patterns, the essential elements of which are virtually identical to those in *Geier*. Petitioner, too, eventually made restitution to his clients, but only after he **repeatedly** allowed the balance in his escrow account to fall below the amounts he was required to be holding on his clients' behalf. Moreover, Geier presented the court with more compelling mitigation than Petitioner herein, including a lack of any significant disciplinary history. In sum, Petitioner committed the same misconduct at issue in *Geier*, but repeatedly and over a period of years, with less mitigation. How then can Petitioner claim that disbarment was warranted in Geier's case, but not in his own, thus violating his right to equal protection of the law?

Petitioner further claims that he should not have been disbarred because he "lacked venality." In fact, the Appellate Divisions repeatedly have concluded that the absence of venality will not justify or otherwise excuse misconduct of the type engaged in by Petitioner herein. Such misconduct has been viewed as a serious violation of an attorney's fiduciary responsibilities, which undermines the public's trust in the Bar and fully warrants the ultimate sanction of disbarment absent unusual mitigating circumstances. *See, e.g.*, *Matter of Henry*, 221 A.D.2d 32 (2d Dep't 1996); *Matter of McFarlane*, 197 A.D.2d 197 (2d Dep't 1994); *Matter of Harris*, 124 A.D.2d 126 (2d Dep't 1987).

The Grievance Committee respectfully submits that, in Petitioner's case, the Appellate Division appropriately exercised its discretion by imposing the sanction of disbarment, based upon the unique set of facts and circumstances of the case. The court's decision to disbar Petitioner, after review and consideration of the extensive record in the case, reflects the court's assessment of the

egregiousness of his misconduct. Moreover, although Petitioner cloaked in equal protection language certain of the issues raised in his petition to this Court, they actually are questions of fact properly determined by the courts below. In sum, Petitioner has failed to present any substantial Constitutional issues, including those of equal protection, that warrant review by this Court.

III.

PETITIONER'S ALLEGATION THAT HIS COUNSEL FAILED TO SUBMIT POST HEARING BRIEFS IS NOT TRUE. HIS COUNSEL'S ACTIONS WERE PROPER AND DID NOT MATERIALLY PREJUDICE PETITIONER'S CASE.

Andrew Maloney, Petitioner herein, claims that his attorneys made material omissions amounting to "ineffective assistance of counsel." None of Mr. Maloney's claims is true.

It should be noted that Mr. Maloney successively retained and discharged three separate law firms during the course of the disciplinary proceeding, all of which have extensive experience in handling attorney disciplinary matters. Mr. Maloney's allegation that two of these well regarded firms, in succession, failed to submit "credible documentary evidence at trial that would have exculpated him from several of the pending charges," and additional characters letters that he provided to counsel strains credulity.

With respect to the first allegation, if Mr. Maloney had provided his counsel with documentary evidence that refuted "several" (unspecified) charges, as he claims, his experienced counsel certainly would have offered it

in evidence. With respect to the second allegation, Mr. Maloney's counsel submitted twelve character letters, in due course, which were admitted in evidence. Mr. Maloney admits in the instant petition that he did not provide the contested additional character letters to his counsel until **"subsequent to trial"** [emphasis added]. He also claims that his then counsel failed to submit "several critical pieces" of documentary evidence to the court **after** the hearing was concluded. With all due respect, Mr. Maloney knows, or should know, that it is wholly inappropriate and improper to put new evidence before the court, *ex post facto*, after the proceeding has been concluded.

Assuming *arguendo* the accuracy of Petitioner's allegations against his attorneys, their respective failures to submit the documents at issue almost certainly would not have affected the court's decision on the charges. Whether Petitioner belatedly disbursed escrow funds, after having been charged with his failure to do so, would not have been information relevant to, or determinative of, the few unspecified charges. Moreover, Petitioner's counsel submitted 12 character letters during the proceeding. It is extremely unlikely that the alleged failure to submit "several" other character letters would have affected the Appellate Division's ultimate decision to disbar Petitioner.

Mr. Maloney also falsely claims that his counsel failed to submit proposed findings to the Special Referee. As is set forth in the Report of the Special Referee, at page 10, at the conclusion of the hearing the matter was adjourned to May 24, 2000, for the mutual exchange and filing of proposed findings and conclusions. Said date was adjourned upon consent to June 14, 2000. However, Mr. Maloney changed counsel again on or about June 13, 2000, and the date for the

mutual exchange and filing of proposed findings and conclusions was again adjourned, to July 12, 2000. The Grievance Committee was served with a copy of Mr. Maloney's counsel's proposed findings on the adjourned return date, July 12, 2000, along with a copy of the letter reflecting transmittal to the Special Referee.

Proposed findings in the context of a disciplinary proceeding are intended to persuade the Special Referee that the evidence supports a finding in favor of the party and to provide the Special Referee with findings that he/she can adopt if he/she is so persuaded. In Mr. Maloney's case, the Special Referee obviously was persuaded that the evidence supported the proposed findings submitted by the Grievance Committee, and he issued a Report adopting same on or about July 19, 2000. The Referee could instead have adopted the proposed findings submitted by Mr. Maloney's counsel if he had found Mr. Maloney's position to be credible or supported by the evidence. He obviously did not do so. The fact that the Referee was not persuaded by Mr. Maloney's counsel's proposed findings, and thus did not adopt them, does not mean that his counsel failed to submit them to the Referee.

After the Special Referee issued the report sustaining the charges, the Grievance Committee moved in the Appellate Division, Second Department, for its confirmation. Mr. Maloney falsely claims that his counsel failed to respond to said motion. As is clearly reflected in the record below, the return date on the Grievance Committee's motion to confirm was August 25, 2000. Mr. Maloney's counsel requested several adjournments, at least through September 29, 2000. The Grievance Committee has no information regarding whether Mr. Maloney's counsel was granted additional adjournments. In any event, he submitted a cross motion on or about December 11, 2000.

Regardless of whether or not the cross motion was timely, its contents unquestionably were considered by the Appellate Division in reaching its April 17, 2001, decision to disbar Mr. Maloney, perhaps because of Mr. Maloney's counsel's intervening illness, which, upon information and belief, was serious and prolonged. The language of the decision clearly reflects that the court considered the cross motion, in that it makes a specific reference to it and notes the various mitigating factors that Mr. Maloney asks therein that the court consider in determining the appropriate measure of discipline to impose.

The Grievance Committee categorically denies Petitioner's allegation that it wrongfully provided the Appellate Division with portions of the transcripts of his depositions that were to be redacted. As can be determined from the list of exhibits included in the record below, the transcripts of Petitioner's depositions [PX-9 & PX -10] were redacted as stipulated between counsel.

The Grievance Committee further categorically denies Petitioner's allegation that it provided the Appellate Division with "several items" that were to be excluded from the record. It cannot respond with more specificity because Petitioner failed to identify the documents at issue.

CONCLUSION

The issues presented by Petitioner do not reach the constitutional dimensions worthy of address by the Supreme Court of the United States. Although Petitioner couched his arguments in constitutional due process and equal protection language, in fact, he simply disputes the factual findings regarding his gross misuse of clients' funds, and the legal determinations made by the courts below. None of the arguments advanced by Petitioner involves an important question of federal law that has not been, but should be, addressed by this Court, and its further consideration of Petitioner's claims is not warranted. Accordingly, the Grievance Committee respectfully urges that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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